UNITED STATES REPORTS
VOLUME 517

CASES ADJUDGED
IN
THE SUPREME COURT
AT
OCTOBER TERM, 1995

OPINIONS OF MARCH 20 THROUGH (IN PART) JUNE 13, 1996

ORDERS OF MARCH 20 THROUGH JUNE 13, 1996

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER
REPORTER OF DECISIONS

WASHINGTON : 1999

Printed on Uncoated Permanent Printing Paper

For sale by the U. S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
DAVID H. SOUTER, Associate Justice.
CLARENCE THOMAS, Associate Justice.
RUTH BADER GINSBURG, Associate Justice.
STEPHEN BREYER, Associate Justice.

RETIRED

LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.

OFFICERS OF THE COURT

JANET RENO, Attorney General.
DREW S. DAYS III, Solicitor General.
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
DALE E. BOSLEY, Marshal.
SHELLEY L. DOWLING, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 30, 1994, viz.:

For the District of Columbia Circuit, William H. Rehnquist, Chief Justice.

For the First Circuit, David H. Souter, Associate Justice.

For the Second Circuit, Ruth Bader Ginsburg, Associate Justice.

For the Third Circuit, David H. Souter, Associate Justice.

For the Fourth Circuit, William H. Rehnquist, Chief Justice.

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, John Paul Stevens, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Clarence Thomas, Associate Justice.

For the Ninth Circuit, Sandra Day O'Connor, Associate Justice.

For the Tenth Circuit, Stephen Breyer, Associate Justice.

For the Eleventh Circuit, Anthony M. Kennedy, Associate Justice.

For the Federal Circuit, William H. Rehnquist, Chief Justice.

September 30, 1994.

(For next previous allotment, and modifications, see 502 U. S., p. vi, 509 U. S., p. v, and 512 U. S., p. v.)

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF CHIEF JUSTICE BURGER*

TUESDAY, APRIL 30, 1996

Present: CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our late colleague and friend, Chief Justice Warren Earl Burger.

The Court recognizes the Solicitor General.

Mr. Solicitor General addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting of the members of the Bar of the Supreme Court this afternoon, resolutions memorializing our regard for the Honorable Warren E. Burger and expressing our profound sorrow at his death were unanimously adopted. With the Court's leave, and following recent precedent, I shall read selectively from the resolutions at this time and shall ask that they be set forth in their entirety in the records of the Court.

---

*Chief Justice Burger, who retired from the Court effective September 26, 1986 (478 U. S. VII), died in Washington, D. C., on June 25, 1995 (515 U. S. III).

RESOLUTION

Warren Earl Burger served the Court and the country as Chief Justice of the United States from 1969 until his retirement in 1986. Lawyer, administrator, and jurist, Warren Burger embodied the finest traditions of American law in a career that spanned 65 years.

Chief Justice Burger was very much a product of this Nation, a practical man with a passion for freedom and an understanding of the responsibilities that freedom entails.

As a judge, he understood that the exercise of liberty must be guided by our traditions constrained by the rule of law. As an administrator, he sought tirelessly to improve the ways in which the legal system works for the people it is supposed to serve. Above all, as a lawyer, he knew the importance of tempering abstract legal doctrine with common sense.

The resolution describes Burger's birth and early life in Minnesota, how he worked his way through college and law school and quickly established himself as one of the preeminent lawyers in the State's private bar, his marriage to Elvera Stromberg, who would be his lifelong companion, and commitment to his family, and his increasing involvement in the affairs of his community.

An incident of that time helps illustrate Burger's personal commitment to the principles that animate the Constitution. After Pearl Harbor, there was widespread support for the policy of forcibly relocating California's Japanese Americans. The young St. Paul lawyer's voice was one of the few to argue that these citizens' constitutional rights ought not be sacrificed to popular passion.

He organized a committee of the Council on Human Relations to help resettle some of them in Minnesota, and opened his home to one family for nearly a year while the father looked for work.

Although Burger refused all requests that he run for public office, he became deeply involved in Minnesota political life. At the 1952 Republican National Convention, he was instrumental in swinging his State delegation to support Dwight D. Eisenhower, thereby assuring General Eisenhower the party's nomination.

Following the election, President Eisenhower called him to Washington to serve as an Assistant Attorney General of the United States in charge of the Civil Division. The resolution discusses his outstanding contributions at the helm of the Civil Division until his appointment, 3 years later, to the United States Court of Appeals for the District of Columbia.

At that time, the Federal courts of the District of Columbia had the widest jurisdiction of any courts in the United States, functioning as the equivalent of State courts for the District itself, as well as having the regular jurisdiction of other Federal courts.

Judge Burger quickly found himself embroiled in important controversies regarding the criminal law that were sweeping both the legal profession and the Nation at the time. Burger's opinions, whether for the court or in dissent, grew to the view that solicitude for the rights of the defendant should be tempered by recognition of the need to enforce the law, yet he was reluctant to press to overrule prior decisions, preferring instead to curtail their reach while preserving their essence.

The resolution then describes aspects of Burger's tenure at the D. C. Circuit, which established him as a leader on his court and throughout the Nation.

When Chief Justice Earl Warren retired, President Nixon turned to Warren E. Burger. With the unanimous endorsement of the Judiciary Committee, Burger was quickly confirmed by the Senate. He was sworn in as Chief Justice of the United States on June 23, 1969.

There were many who expected that as Chief Justice he would try to overturn the landmark criminal law decisions of the Warren Court, but neither those who hoped for this outcome, nor those who feared it, seemed to have considered that one of the hallmarks of this judge was respect for precedent.

Chief Justice Burger cared too deeply for the great institution that is the Supreme Court of the United States to believe that its decisions, the articulation of our Nation's highest law, could be tossed aside whenever there was a change of personnel on the bench.

His approach to major criminal law precedents such as *Miranda* v. *Arizona* and *Mapp* v. *Ohio* was to leave such rulings intact, while defining their outer limits.

Under his leadership, for instance, the Court held that an otherwise inadmissible statement could be used to impeach a defendant's credibility at trial. He joined in one opinion establishing a public safety exception to *Miranda* and, in another, deciding that a confession obtained in violation of *Miranda* did not taint a second valid confession obtained later.

Similarly, the Court he led trimmed the exclusionary rule enshrined in *Mapp* by carving out good faith exceptions.

Burger's conservatism was of that American strain which insists that the law protect the individual from the excesses of State power. He was to state clearly and repeatedly that he would never vote to overrule *Miranda* because to do so would be an invitation to lawlessness by law enforcement authorities.

He concurred in decisions extending to misdemeanor cases the right of indigent defendants to counsel, and recognizing a defendant's right to a psychiatrist if necessary for his defense.

Chief Justice Burger placed a premium on protecting individual liberties. His strong commitment to the First Amendment values of freedom of speech and the press can be seen in many of his opinions.

In *Wooley* v. *Maynard*, for example, he authored the opinion holding that a State may not compel an individual to carry on his license plate a slogan offensive to his deeply held views.

Yet Burger also recognized that our freedoms are not absolute, that there are limits beyond which we may not go without trampling on the rights of others. In *Miller* v. *California*, Chief Justice Burger crafted the definition of obscenity that we use today.

Further, in declaring that it was up to local juries applying contemporary community standards to decide whether a particular work fit the Court's formulation, he put to rest the idea that there was some uniform national community standard in such matters.

The resolution describes The Chief Justice's commitment to the freedom of conscience exemplified by his opinions for the Court interpreting the religion clauses in cases such as *Lemon* v. *Kurtzman* and *Wisconsin* v. *Yoder*.

Turning to Burger's contributions to the area of civil rights, the resolution observes that, as district courts became involved in complicated questions of quotas, racial balance, redrawing of school district lines, busing and more, many doubted the propriety of the Court's involvement at all, and some believed that Chief Justice Burger was hostile to such efforts.

He put disbelief to rest in *Swann* v. *Charlotte-Mecklenburg Board of Education*. Writing for a unanimous Court, The Chief Justice emphatically affirmed the vital role of the Federal courts in eliminating all vestiges of racial segregation from public school systems.

In other civil rights cases, he led the Court in upholding congressional set-asides of a percentage of public works funds for minority businesses, invalidating State aid to racially segregated private schools, and sustaining the Internal Revenue Service's denial of tax exemptions to private schools that practice racial discrimination.

During Chief Justice Burger's tenure, the Court also adopted a progressive approach to the rights of women and members of other disadvantaged groups under the Equal Protection Clause. His own more significant opinions included *Reed* v. *Reed*, striking down a State statute giving preference to men over women in estate administrations, and *Hishon* v. *King and Spalding*, applying Title VII's prohibition of sex discrimination to law firm partnership decisions.

He voted to end gender classifications on social security dependent benefits and jury selection, and to declare invalid State laws restricting aliens' access to public employment and welfare benefits.

After discussing Burger's role in *Roe* v. *Wade* and its progeny, the resolution turns to The Chief Justice's extraordinary contributions to this Court's separation of powers jurisprudence.

Warren Burger was intensely interested in American Government. He understood fully the concerns that had led the Framers to separate Government power among competing and mutually restraining legislative, executive, and judicial branches. In a case that produced one of his most important opinions, *Immigration and Naturalization Service* v. *Chadha*, the Court invalidated the device known as the one-House veto.

History will surely view Chief Justice Burger's opinion for the Court in another separation of powers case as the most significant of his career, indeed as one of the most important opinions of any justice at any time. *United States* v. *Nixon* was to lead directly to the resignation of a President.

The special prosecutor's indictment of certain defendants in the Watergate affair was being hampered by President Nixon's refusal to turn over tapes and other records of conversations between him and others, including Government officials.

The President, like several of his predecessors, claimed executive privilege. The district court had ruled that the special prosecutor had rebutted the presumption of privilege and ordered an in camera examination of the subpoenaed material.

The Chief Justice's opinion for the Court upheld the validity of the district court's order. The President's generalized assertion of privilege could not prevail over the fundamental demands of due process of law and the fair administration of criminal justice. It would have to yield to the demonstrated specific need for evidence in a pending criminal trial.

Chief Justice Burger's interest in American Government also served him well as the administrative leader of the third branch. Indeed, he took his title, Chief Justice of the United States, seriously. In his eyes, its mandate encompassed stewardship of the entire judicial system, State and Federal.

His role in reforming the American judicial system was profound. He was an active leader of the Federal judiciary as Chairman of the Judicial Conference of the United States. He turned the Federal Judicial Center, of which he was Chairman of the Board by statute, into a respected source of research and writing about the courts, and a rich educational resource. He promoted the idea of circuit executives, officials who now contribute so much to the efficient working of our courts.

In addition to his many contributions toward beneficial change, Chief Justice Burger revered this Court's history and saw its building not just as a courtroom and chambers, but as an opportunity to educate the public.

A guiding spirit of the Supreme Court Historical Society and creator of the position of Curator of the Supreme Court, Burger helped to fill empty spaces with exhibits and to rekindle discussion and debate about our constitutional heritage.

The resolution finally recounts the qualities that mark The Chief Justice as a man of great warmth and kindness. This was a man who, for example, conceived and personally supervised the construction of a ramp to enable Justice Douglas to take his place at the bench after the latter's stroke. He was a man who, for more than 10 years, sent pins garnered in his world travels to the handicapped child of a former clerk.

Many could not comprehend why Warren Burger would leave one of the most powerful positions in Government to serve as Chair of the Commission on the Bicentennial of the United States Constitution.

They did not know the man, with his love of that normal document, his understanding of our Nation's traditions, his appreciation of the lessons of history, and his faith in the power of education. There was no one in the United States more suited to the task, and no role more fitting as a capstone to his distinguished career.

We cherish this image of Warren Burger as a teacher of fundamental democratic values to the Nation's children and to us all.

Wherefore, it is accordingly

RESOLVED that we, the Bar of the Supreme Court of the United States, express our profound sorrow that Chief Justice Warren E. Burger is no longer with us, our admiration for his deep understanding of our history and traditions as a Nation, and his commitment to those wide restraints that make us free, and our gratitude for his ceaseless labors to improve the administration of the Nation's system of justice; and it is further

RESOLVED that the Solicitor General be asked to present these resolutions to the Court, and that the Attorney General be asked to move that they be inscribed upon the Court's permanent records.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. I recognize the Attorney General of the United States.

Attorney General Reno addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The Bar of this Court met today to honor the memory of Warren Earl Burger, The Chief Justice of the United States from 1969 to 1986.

Born in St. Paul in 1907 to a family of modest means, Warren Burger was raised on a small truck farm in Stacy, Minnesota. He attended local public schools and in high school was president of the Student Council and editor of the school newspaper, and he lettered in football, hockey, swimming, and track.

He then worked his way, selling insurance by day, through the University of Minnesota and the St. Paul College of Law, now William Mitchell, where he attended nights, receiving his law degree magna cum laude in 1931. Two years later, he married Elvera Stromberg. Harry Blackmun, his childhood friend and future colleague on this Court, was best man.

After graduating from law school, he soon joined an established firm in St. Paul, where he became a partner. From the beginning, Warren Burger demonstrated in both his public and his private life a deep commitment to just treatment of individuals of all races.

In the 1940's, he served on St. Paul's first Council on Human Rights, which he helped organize to fight racial discrimination, and when Japanese Americans were forced to leave their West Coast homes following the bombing of Pearl Harbor, he led a committee to help resettle those who had been displaced.

He became aligned politically with Harold Stassen, managing Stassen's first gubernatorial campaign in 1938, and his campaign for the Republican presidential nomination in 1948.

While serving as Stassen's floor manager at the Republican National Convention in 1952, Burger pledged the Minnesota delegation's support to Dwight Eisenhower, ensuring Eisenhower's nomination on the first ballot.

His energy, abilities, and political acumen did not go unnoticed. In 1953, he left Minnesota for Washington, D. C., accepting President Eisenhower's appointment to serve as an Assistant Attorney General in charge of the Civil Division under Attorney General Brownell. His distinguished service in that capacity included several appearances before this Court.

In 1956, President Eisenhower persuaded the Assistant Attorney General to forgo his return to private practice in St. Paul and instead to accept the President's nomination to a seat on the United States Court of Appeals for the District of Columbia. He would serve with distinction on that influential court for 13 years, developing a national reputation.

Judge Burger's express desire to restore greater balance to the criminal justice system caught the attention of the newly inaugurated Richard Nixon. Impressed as well with Judge Burger's reputation as an outstanding jurist, President Nixon nominated him to replace the retiring Earl Warren.

Less than 5 weeks later, on June 23rd, 1969, Warren Burger was sworn in as this Nation's fifteenth Chief Justice. He served in that role for 17 years, longer than any other Chief Justice in the 20th Century.

Confounding the expectations of those who hoped, or feared, that he would immediately set about reversing the decisions of the Warren era, the new Chief Justice was not an advocate for radical change. His experiences as a practitioner, as Government official, as Federal judge, had instilled in him a skepticism towards rigid doctrinal views of any stripe.

His jurisprudence was complex and nuanced, but consistently reflective of certain core values, a reverence for the constitutional framework envisioned by the Founders, a deep appreciation of the personal and structural importance of our fundamental liberties, including those of the people as an organized community, an understanding that the law must take account of realities beyond the courtroom, and a steadfast dedication to improving the administration of justice.

In addition to his contributions as a jurist, Warren Burger's tenure was remarkable for his intensive efforts to improve the quality of both the bench and the bar. He implemented the most significant administrative overhaul of this Court since the Taft era, directing substantial investments in systems and modernization and at the same time devoting significant resources to the preservation and commemoration of the Court's traditions and history, making the Court a more accessible and welcoming place for the thousands who visit its halls.

As Chief Justice of the United States, Burger approached the task of judicial administration with an appreciation that how justice is dispensed at every level directly affects the lives of the people.

In 1971, for example, he helped found the National Center for State Courts in Williamsburg, Virginia, which provides information, education, and management services for Court leaders.

Following a prison riot at Attica, New York, he was instrumental in establishing the National Institute of Corrections, an agency charged with providing specialized correction service to State and local corrections agencies, and as Chairman of the Board of the Federal Judicial Center, The Chief Justice guided the newly established center's growth into a full fledged agency for research and training for the Federal courts.

The Chief Justice also visited and studied legal institutions in various parts of the globe, and participated actively in symposia with scholars and statesmen from around the world.

Drawing largely on the British experience, he promoted the establishment and growth of the American Inns of Court program, which today has hundreds of local chapters throughout the 50 States and the District of Columbia, bringing novice attorneys together with more experienced attorneys and local judges to help the former develop trial skills and to promote more generally a sense of ethics and fellowship within the profession.

Burger's concern for the practical effect of legal rules played an important part in his jurisprudence. He was, for example, skeptical that the benefits of the exclusionary rule justified its cost to society. While the Court has retained the exclusionary rule, Chief Justice Burger played a key part in excepting from its reach classes of cases that do not persuasively implicate the rule's deterrence rationale.

Most noticeably, he delivered the opinion of the Court in *Nix* v. *Williams,* recognizing the inevitable discovery exception. The basis for the exception was explicitly pragmatic.

If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, then the deterrence rationale has so little basis that the evidence should be received.

The Chief Justice's reluctance to afford unlimited scope to abstract doctrine featured prominently in his landmark opinion for a unanimous Court in *United States* v. *Nixon*, upholding the special prosecutor's subpoena of the President's tape-recorded conversations.

Although The Chief Justice recognized that the President has a legitimate need for confidentiality in the performance of his executive duties, he rejected the contention that the President is entitled to an absolute privilege from disclosure.

The Chief Justice observed that privileges against forced disclosure are rare exceptions to the demand for every man's evidence. They are not lightly created nor expansively construed, for they are in derogation of the search for truth.

Though skeptical of judgemade rules, Chief Justice Burger observed strict fidelity to the dictates of the Constitution, particularly the structural limitations that inhere in the separation of powers, which he believed critical to the stability of our system of governance.

In 1983, he delivered the landmark opinion in *INS* v. *Chadha*, striking down on separation of powers grounds a one-House veto provision in the Immigration and Nationality Act, which permitted either House of Congress unilaterally to overrule immigration decisions delegated by law to the discretion of the Attorney General.

Notwithstanding Congress' use of similar provisions in literally hundreds of enactments, the Court held the one-House veto procedure to be violative of the constitutional requirements for a valid legislative act, namely, bicameral approval and presentment to the President.

The Chief Justice's opinion explained: The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.

> "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."

Toward the end of his tenure, Chief Justice Burger again wrote for the Court in *Bowsher* v. *Synar*, striking down provisions of the Gramm-Rudman-Hollings Act that required the President to make budget cuts specified by the Comptroller General under certain emergency conditions.

Concluding that the Comptroller General was answerable to Congress, The Chief Justice rejected the argument that he was unlikely, in fact, to act as an agent for the legislative branch. The separation of powers must be strictly enforced, he wrote, because as the Founders well understood, in the long term, structural protections against abuse of power are critical to preserving liberty.

To Warren Burger, there was special significance in the first three words of the Constitution: 'We, the People.' They were a concise, yet momentous declaration that for the first time in history, power was created in a Government from the bottom up, not from the top down.

That Government was under the Constitution, therefore would not always be tidy, was all only natural. Democracy, as The Chief Justice understood it, is people, men and women with all their virtues and flaws, trying to work together to produce ordered liberty.

The Chief Justice's abiding faith in the ordinary men and women of this Nation is reflected in his belief that along with the structural safeguards afforded by the separation of powers, the guarantees of the First Amendment are critical to the maintenance of ordered liberty.

The link between structural integrity and free speech is manifest in his several opinions involving the right of the people to hear, see, and communicate observations concerning criminal proceedings. The Chief Justice explained that people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

Warren Burger's appreciation of the value of individual liberties was reflected in many of his constitutional opinions. In *Wisconsin* v. *Yoder*, for example, where the Court upheld on free exercise grounds the right of Amish parents to except their offspring from uniform State schooling requirements, he recognized as a constitutional imperative the principle that a way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

In *Wooley* v. *Maynard*, he again championed the right not to conform, authorizing the Court's opinion affirming the right of Jehovah's Witnesses to refuse to display the motto, "Live Free or Die," on their New Hampshire license plates. He explained that where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interests cannot outweigh an individual's First Amendment right to avoid being the courier for such message.

He recognized at the same time, however, that the claims of individual liberty do not invariably outweigh the right of the people as a community to foster and protect common values and needs. Under the now-familiar standard for the Court articulated by The Chief Justice in *Miller* v. *California*, whether speech is obscene and therefore unprotected is judged from the viewpoint of the average person applying contemporary community standards.

And in *Paris Adult Theater I* v. *Slaton*, he upheld for the Court the State's authority to regulate the exhibition of obscene material in places of public accommodation, recognizing that the State's legitimate interest encompassed the interest of the public in the quality of life in the total community environment, the tone of commerce in the great city centers, and possibly the public safety itself.

In The Chief Justice's jurisprudence, the balance of individual and community rights is sensitive, as exemplified by his opinions for the Court in cases involving claims of religious establishment. In upholding New York's tax exemption for property used for religious education or charitable purposes in *Walz* v. *Tax Commission of New York,* he acknowledged that the test is inescapably one of degree, and explained that it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution.

In the following year, in *Lemon* v. *Kurtzman,* The Chief Justice again wrote for the Court, this time striking down State programs providing aid to parochial schools that fostered an excessive degree of entanglement of church and State.

Finally, Warren Burger remained true on the bench to his lifelong commitment to the equal treatment of individuals, irrespective of race or national origin. In one of his first major opinions as Chief Justice, he delivered the Court's unanimous opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education.* Affirming the propriety of comprehensive relief, including busing of students to remedy racial segregation in education, he was equally vigilant in guarding against less direct, but still invidious forms of discrimination.

He wrote opinions for the Court adopting a disparate impact standard for Federal statutory claims of racial discrimination in employment, condemning on equal protection grounds the provision of State aid to racially segregated private schools and sustaining the denial of Federal tax exemptions to private schools that practice racial discrimination.

Nor were racial minorities the only beneficiaries of The Chief Justice's abiding belief in equal work. In his opinion in *Reed* v. *Reed,* the Court for the first time struck down on equal protection grounds a State statute that arbitrarily discriminated against women, and in *Hishon* v. *King and Spalding,* his opinion for the Court held that the Federal statutory prohibition of sex discrimination in employment applies to partnership decisions made by a law firm.

It was because of his dedication to, indeed, reverence for the principles embodied in our Constitution that Warren Burger retired from the Supreme Court in 1986 to head the Commission on the Bicentennial of the Constitution. He served in that capacity as a tireless emissary of the Constitution to the ordinary men and women, and particularly the children of this Nation.

In that role, as in all of the varied contexts in which he toiled and emerged as a leader in the law, as private lawyer, Assistant Attorney General, appellate judge, and Chief Justice of the United States, his dedication to liberty and equality, his faith in the citizens of this land, and his commitment to maintaining the integrity of our constitutional structure, guided his steps and consequently illuminated the path for us all.

MR. CHIEF JUSTICE, on behalf of the lawyers of this Nation and, in particular, of the Bar of this Court, I respectfully request that the resolutions presented to you in honor and celebration of the memory of Chief Justice Warren E. Burger be accepted by the Court, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Thank you, Attorney General Reno, and thank you, General Days.

The Court thanks both of you for your presentation today in memory of our late colleague and friend, Chief Justice Burger.

We ask that you convey to Chairman John Sexton and the members of the Committee on Resolutions, Chairman Charles A. Hobbs and the members of the Arrangements Committee, and Michael Luttig, Chairman of today's meeting of the Bar, our appreciation for these appropriate resolutions.

Your motion that these resolutions be made a part of the permanent records of the Court is granted.

For 17 years, a longer tenure than all but three of his predecessors, Warren Burger presided over this Court. During that period of time, as might be expected, he authored numerous important opinions for the Court on a variety of subjects. The Nixon tapes case, *INS* v. *Chadha, Miller* v. *California, Milliken* v. *Bradley, Nebraska Press Association* were but a few. The resolutions mentioned many others.

He was particularly interested in the constitutional doctrine of separation of powers, and in the speech and religion clauses of the First Amendment. He was a person of strong convictions, who was nonetheless able to work harmoniously with his colleagues.

The English scientist and philosopher, Alfred North Whitehead said in one of his books, all the world over and at all times, there have been practical men absorbed in irreducible and stubborn facts. All the world over, and at all times, there have been men of philosophic temperament who have been absorbed in the weaving of general principles.

No one, of course, is wholly in one of these camps or the other, but I think one would have to say that Warren Burger was predominantly in the camp of the practical man, as you have suggested, General Days.

He was concerned as to how the Court's decisions would be translated into law at the trial level and at the community. To that end, he was instrumental in the founding of the National Center for State Courts, as you have mentioned, General Reno, an organization devoted to providing administrative and technical assistance to State court systems.

He was instrumental in the founding of the Institute for Court Management. He pioneered the idea of the Inns of Court in the United States, where law students, faculty, practicing lawyers, and judges could dine and meet together in the pursuit of their common interests.

He was firmly of the view that the English system on which these Inns were patterned did a better job of disciplining practicing lawyers than did the more formal procedures employed in this country.

Here at the Court, Warren Burger made changes that materially improved our operation. Take, for example, his reconfiguration of the bench on which my colleagues and I are now sitting.

We take for granted the shape of the bench, and after 25 years it is understandable, but before the advent of Warren Burger it was an absolutely straight bench, making it difficult for colleagues on either end to question counsel, difficult for colleagues in the middle to hear questions from either end, and difficult for counsel to address their remarks to those towards the end of the bench.

By simply moving the two wings of the bench slightly forward, all of these difficulties were corrected or alleviated, although others may have been brought about.

It can also be said, I think, that he made the Court more centrist by bringing the left and right wings closer together.

Chief Justice Burger also brought the Court from the days of a hot lead printing press to automation in the printing of its opinions. The hot lead press which we had when I became a member of the Court some 20 years ago was little different from the printing press the Court had when I was a law clerk in the early fifties and, indeed, little different from the kind of hot lead press on which we set type for our high school newspaper at the beginning of World War II.

And during the June crunch, as we came to know it, you would have to wait 2 or 3 days between the time you sent an opinion, draft opinion to the printer, and the time you could get it back.

This all changed under Chief Justice Burger's regime, and major steps toward the kind of automation we have today were taken.

Warren Burger was a man of tremendous energy. Often, when a lawyer takes the bench, he becomes less involved than previously with the various concerns of the legal profession, but this was not true of Warren Burger. As an appellate judge, he helped to found the Appellate Judges Conference at New York University, and he also played an important part in the drafting of the standards of criminal justice for the American Bar Association.

When he retired as Chief Justice in 1986, he said that one of the reasons he did so was that he could not do justice to both the office of Chief Justice and his position as Chairman of the Committee on the Bicentennial of the Constitution.

When asked why he had chosen his chairmanship over the Chief Justiceship, he replied that he thought the President would have no trouble finding someone to be Chief Justice—but he might have trouble finding someone to be Chairman of the Committee on the Bicentennial, and after his retirement, he was able to concentrate on the Bicentennial Commission and bring that tremendous energy to bear to make Americans better acquainted with their Constitution.

He was on occasion pressed by scholars to devote a large part of the resources of the Committee to academic forums and treatises on constitutional law, but he declined to do so. He saw his job as bringing home to millions of Americans the significance of their Constitution, and he succeeded magnificently in doing so.

Warren Burger and I were good friends from the first time I met him, when he informally swore me in as an Associate Justice of this Court in December 1971. I continue to miss him.

I remember stopping in to see him only a few weeks before his death, and he was very proud of a just-published book he had written about famous Supreme Court cases entitled, *It Is So Ordered.* Here was a man, 88 years old, who had just finished writing a book.

Warren Burger, the fifteenth Chief Justice of the United States, left a large mark on this Court. He also left a large mark on the legal profession as a whole, a profession in which he retained an abiding interest throughout his life.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1994 edition.

Cases reported before page 1101 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1101 *et seq.* are those in which orders were entered. The opinion reported on page 1301 is that written in chambers by an individual Justice.

Page
A.; New Mexico Dept. of Human Services *v.* 1190
A. A. & M. Carting Service, Inc. *v.* Babylon 1150
Aaron; Johnson *v.* 1236
Aaron *v.* Public Utilities Comm'n of Cal. 1185
Abbas *v.* United States 1229
Abbey Medical, Inc.; Williams *v.* 1239
Abbott *v.* Oregon 1214
Abbott Ambulance; Bi-State Dev. Agcy., Mo.-Ill. Metro. Dist. *v.* 1156
ABC–TV; Jones *v.* 1132
Abdelmeged *v.* B–G Maintenance Management of Colo., Inc. 1145
Abdul Hakeem *v.* New York 1201
Abdullah *v.* Groose 1215
Abeles *v.* Infotechnology, Inc. 1156
Ables *v.* Johnson 1198
Abraham *v.* Adcock 1172
Abrams *v.* Johnson 1207,1241
Abrams *v.* Urban Homeowners' Corp. of New Orleans 1165
AC Rochester; Wynn *v.* 1151
Adames *v.* United States 1250
Adams *v.* United States 1184
Adams *v.* U. S. District Court 1224
Adcock; Abraham *v.* 1172
Adherence Group, Inc.; Gerasolo *v.* 1209
Administrator, Hughes Non-Bargaining Retirement Plan; Hughes Salaried Retirees Action Committee *v.* 1189
Agostini; Burkhart *v.* 1221
Aguilar *v.* New Mexico 1145
Aguilar *v.* Newton 1145,1230
Aguirre *v.* United States 1216

Page
Aikens *v.* United States 1116
Aitken; Amphitheater Public Schools *v.* 1208
Akech *v.* United States 1125,1230
Akere *v.* United States 1228
Alabama; Dobyne *v.* 1169
Alabama; Jackson *v.* 1247
Alabama *v.* Poarch Band of Creek Indians 1133
Alabama; Poarch Band of Creek Indians *v.* 1133
Alabama *v.* Seeley 1187
Alabama Comm'r of Revenue *v.* Owner-Operator Independent Drivers Assn., Inc. 1121
Alabama State Bar; Lyon *v.* 1105
Alaska *v.* Babbitt 1187
Alaska; Linton *v.* 1197
Alaska; Totemoff *v.* 1244
Alaska; United States *v.* 1207
Alaska Federation of Natives *v.* United States 1187
Albuquerque; Westland Development Co. *v.* 1244
Alcones *v.* Office of Personnel Management 1140
Aleali *v.* Merkle 1212
Alexander *v.* Mississippi 1145
Alexander *v.* United States 1174,1188
Alferos *v.* Office of Personnel Management 1139,1251
All American Asphalt *v.* Hyles 1188
Allard *v.* Flamingo Hilton 1168
Allen, *In re* 1165
Allen; Calhoun *v.* 1247
Allen *v.* Florida 1107
Allen; Steeves *v.* 1146
Allen *v.* United States 1130,1181,1200
Allen; Zankich *v.* 1159
Alligator Farms, Inc. *v.* Groner 1120
Allstate Ins. Co.; Parks *v.* 1159
Allstate Ins. Co.; Quackenbush *v.* 706
Allstate Ins. Co.; Roussos *v.* 1107
Alsberg *v.* Robertson 1168
Alsberg Brothers Boatworks *v.* Robertson 1168
Alton & Southern R. Co. *v.* Edwards 1221
Altstatt *v.* Oregon State Bar 1129
Alvarez *v.* Office of Personnel Management 1226
Alvarez *v.* United States 1143
Alvarez-Figueroa *v.* United States 1162
Al-Wahhab *v.* Virginia 1172
American Civil Liberties Union Foundation; Jones *v.* 1118,1186

Page
American Fork Investors; Echols *v.* 1204
American General Finance, Inc.; Hanlin *v.* 1121
American Mfrs. Mut. Ins. Co.; Wodarski *v.* 1135
American National Can Co.; Tokhtameshev *v.* 1151
Americanos *v.* Carter 1222
American Pioneer Life Ins. Co. *v.* Williamson 1231
American Premier Underwriters, Inc. *v.* USX Corp. 1221
American S. S. Co. *v.* Cleveland Tankers, Inc. 1220
American Telephone & Telegraph Co.; Saunders *v.* 1150
Ames; Walker *v.* 1123
Amey *v.* United States 1211
Amos *v.* Esmor Mansfield, Inc. 1110
Ampex Corp. *v.* Frymire 1182
Amphitheater Public Schools *v.* Aitken 1208
AmSouth Bancorp., N. A.; Miller *v.* 1213
AMTRAK; Lebron *v.* 1188
Anderson *v.* Davis 1172
Anderson *v.* Newberry 1144
Anderson *v.* Sharma 1234
Anderson *v.* United States 1151,1162
Andrews *v.* Georgia 1106
Andrews *v.* Georgia State Bd. of Pardons and Paroles 1142
Andrews *v.* United States 1239
Angelone; Brown *v.* 1124
Angelone; Snurkowski *v.* 1238
Angel Rivera *v.* United States 1250
Anheuser-Busch, Inc. *v.* Schmoke 1206
Antonelli *v.* Illinois 1111
Antonelli *v.* United States 1223
Apa *v.* Sweeney 1229
Apache Corp. *v.* Moore 1217
Appraisal Foundation; National Assn. of Review Appraisers & Mortgage Underwriters, Inc. *v.* 1189
Archexpo Commerce & Industry Centre *v.* International Ambassador Programs, Inc. 1167
Arevalo-Gamboa *v.* United States 1114
Argus Life Ins. Co.; Kee *v.* 1107
Arias *v.* United States 1227
Arizona; Arizonans for Official English *v.* 1102,1242
Arizona; Barraza *v.* 1115
Arizona *v.* Hook 1190
Arizona; Salazar *v.* 1123
Arizona; Walden *v.* 1146
Arizonans for Official English *v.* Arizona 1102,1242

	Page
Arkansas; Bowen *v.*	1226
Arkansas; Caldwell *v.*	1124
Arkansas; Nooner *v.*	1143
Arkansas; Porter *v.*	1108
Armstrong *v.* Commodity Futures Trading Comm'n	1245
Armstrong; United States *v.*	456
Aronson *v.* Brown	1209
Arteaga *v.* U. S. Court of Appeals	1204
Artis *v.* Garraghty	1225
Arvin-Thornton *v.* Philip Morris Products, Inc.	1151
Ashland Oil, Inc.; Ramey *v.*	1109,1205
Ashley; Silverburg *v.*	1122
Ashley *v.* United States	1147,1250
Asrar *v.* United States	1229
Atherton *v.* Federal Deposit Ins. Corp.	1101,1133,1182
Atkinson *v.* United States	1201
Atlantic Richfield Co. *v.* Beck	1167
Attorney General; Blackston *v.*	1204
Attorney General *v.* Bossier Parish School Bd.	1154,1232
Attorney General; Morrison *v.*	1148
Attorney General; Nicholas *v.*	1158
Attorney General; Pic-A-State PA, Inc. *v.*	1246
Attorney General of Ala.; Bogan *v.*	1170
Attorney General of Colo.; Kailey *v.*	1193
Attorney General of Colo.; Ross *v.*	1111
Attorney General of Colo.; Salazar *v.*	1110
Attorney General of Ind.; Americanos *v.*	1222
Attorney General of Mich. *v.* Department of Justice	1166
Attorney General of Minn.; Pourzandvakil *v.*	1204
Attorney General of Miss. *v.* Dupree	1241
Attorney General of Ohio; Dayton Visually Impaired Persons *v.*	1135
Attorney General of Pa.; Broadwater *v.*	1137
Attorney General of R. I.; D'Amario *v.*	1198
Auciello Iron Works, Inc. *v.* National Labor Relations Bd.	781
Augustin *v.* Florida	1196
Ault; Stearns-Miller *v.*	1225
Aultman Health Services Assn.; Schwartz *v.*	1132
Aultman Hospital; Schwartz *v.*	1132
Auvil *v.* CBS "60 Minutes"	1167
Ayala-Allende *v.* United States	1199
Ayars *v.* New Jersey	1113,1227
Ayers *v.* Fordice	1153
B. *v.* S. L. J.	1118,1185
Babbitt; Alaska *v.*	1187

Page
Babbitt; Fort Sumter Tours, Inc. *v.* 1220
Babbitt; Pittston Co. *v.* 1134
Babbitt *v.* Youpee 1232
Babcock & Wilcox Co.; Clements *v.* 1136,1240
Babylon; A. A. & M. Carting Service, Inc. *v.* 1150
Babylon; USA Recycling, Inc. *v.* 1135
Bachstein, *In re* 1130
Baijnath *v.* Chan 1141
Bailey *v.* United States 1234,1239
Baird *v.* United States 1128
Baker *v.* Hadley 1233
Baker *v.* Internal Revenue Service 1192
Baker *v.* Maryland 1169
Bakker *v.* Federal Deposit Ins. Co. 1233
Bal *v.* New York City 1225
Balandra Schiffahrts-Gesellschaft MBH & Co., KG *v.* Costa 1245
Baldassaro *v.* United States 1207
Balderas Garcia *v.* United States 1127
Baldwin *v.* United States 1231
Balele *v.* Klauser 1172
Balisok; Edwards *v.* 1166
Ballard, *In re* 1118
Baltimore; Neufeld *v.* 1222
Bandura *v.* Immigration and Naturalization Service 1105
Bankers Trust Co. *v.* Procter & Gamble Co. 1205
Bank of America; Strowski *v.* 1106,1204
Bank of America National Trust and Savings Assn. *v.* FDIC 1103
Bankruptcy Judge, U. S. District Court; Youngs *v.* 1184,1247
Banks *v.* California 1142,1216
Banks *v.* San Diego County 1123
Banks *v.* United States 1229
Baptiste *v.* Texas 1125
Barbee *v.* Pennsylvania Dept. of Corrections 1226
Barbee *v.* State Farm Automobile Ins. Co. 1160
Barbour; Platzer *v.* 1109
Barbour *v.* United States 1147
Barcher *v.* Shipman 1235
Bard, Inc.; Talbott *v.* 1230
Barkett *v.* Florida 1237
Barnett; Darden *v.* 1197
Barnett *v.* United States 1173
Barnett Bank of Marion County, N. A. *v.* Nelson 25
Barno *v.* California 1158
Barraza *v.* Arizona 1115

Page
Barron *v.* United States 1200,1250
Bartlett; Bragg *v.* 1110
Bartley *v.* Thompson 1210
Bass *v.* National Super Markets, Inc. 1208
Bass *v.* Nevada Bd. of Medical Examiners 1234
Bass *v.* Sarasota County 1246
Bastine, *In re* 1206
Batista *v.* Buffalo Police Dept. 1109
Baton Rouge Marine Contractors, Inc.; Robillard *v.* 1135
Battle *v.* Bowersox 1235
Batts *v.* Tow-Motor Forklift Co. 1221
Baxley; Roussos *v.* 1225
Baxter *v.* Los Angeles 1249
B & D Mechanical Contractors, Inc.; St. Paul Mercury Ins. Co. *v.* 1167
Beach, Cadigan & Martin; Karageorgos *v.* 1143
Beard; Rauser *v.* 1145
Beck; Atlantic Richfield Co. *v.* 1167
Becker *v.* United States 1126
Beets *v.* Johnson 1157,1252
Bell *v.* Brookshire 1195
Bell *v.* United States 1126
Bell Communications Research; Sever *v.* 1223
Bellcore; Sever *v.* 1223
Bellrichard *v.* United States 1137
Bell, Rosenberg & Hughes; Willis *v.* 1193
BellSouth Telecommunications, Inc. *v.* FCC 1129,1240
Belyeu *v.* Johnson 1144
Benavidez *v.* United States 1250
Bend; Springer *v.* 1209
Bennett *v.* Plenert 1102
Bennett *v.* Texas 1109,1205
Bennett *v.* United States 1145,1162,1191,1238
Bennis *v.* Michigan 1163
Benoit *v.* Louisiana Public Service Comm'n 1117
Benson; Steeves *v.* 1171
Benton, *In re* 1131
Berg, *In re* 1131
Berger *v.* Morgan Hill 1136
Berget *v.* Oklahoma 1247
Bergmann *v.* McCaughtry 1126,1160,1205,1240
Bergmann *v.* McCollough 1141,1230
Berkeley *v.* Home Ins. Co. 1208
Berks County *v.* Murtagh 1104
Bernard *v.* Office of Queens County District Attorney 1143

Page
Bernardez *v.* Office of Personnel Management 1142
Bertasavage, *In re* 1166
Bertoli *v.* United States 1137
Bethea, *In re* 1194
Bevill *v.* Mississippi 1249
B–G Maintenance Management of Colo., Inc.; Abdelmeged *v.* 1145
Biederman, *In re* 1207
Bieri *v.* United States 1233
Bies *v.* Ohio 1238
Biggs *v.* United States 1146
Bilandic; Palmisano *v.* 1223
Bilby-Knight; Mitchell *v.* 1124
Billberry *v.* Electrical Workers 1142
Billups *v.* Schotten 1142
Bingham; Steinberg *v.* 1134,1240
Bingham; Zolt *v.* 1134,1230
Bio-Recovery, Inc., *In re* 1186
Bishop *v.* Rickles 1247
Bi-State Dev. Agcy., Mo.-Ill. Metro. Dist. *v.* Abbott Ambulance 1156
Black *v.* United States 1154
Blackfeet Tribe of Blackfeet Reservation; Jessup *v.* 1129
Blackman *v.* United States 1126
Blackston *v.* Reno 1204
Blair *v.* Idaho 1111
Blalack; Hennessey *v.* 1190
Blanch Co.; Cherokee Ins. Co. *v.* 1156
Blassingame *v.* United States 1237
Blessing *v.* Freestone 1186
Bloomfield, *In re* 1217
Blount *v.* Securities and Exchange Comm'n 1119
Bludworth; Hoke *v.* 1221
Blue Springs *v.* Kincade 1166
Blytheville School Dist. No. 5 *v.* Harvell 1233
BMW of North America, Inc. *v.* Gore 559
Board of County Comm'rs of Bryan County *v.* Brown 1154
Board of Managers of Revere Condominium; Jaffer *v.* 1171
Board of Patent Appeals and Interferences; Roselin *v.* 1116
Board of Regulatory Comm'rs of N. J.; Jersey Carting, Inc. *v.* 1135
Board to Determine Fitness of Bar Applicants, Supreme Court of Ga.; Newton *v.* 1209
"Bob" *v.* "Mary" 1156
Bogan *v.* Sessions 1170
Boggs *v.* Bowron 1134
Bold *v.* United States 1250

Page
Bollman *v.* Emerson 1107
Bolt *v.* Singleton 1151
Bolt *v.* State Farm Fire & Casualty Co. 1120
Bondad *v.* Office of Personnel Management 1139,1252
Bonner *v.* United States 1126
Booker *v.* United States 1111
Borawick *v.* Shay 1229
Borough. See name of borough.
Bossier Parish School Bd.; Price *v.* 1232
Bossier Parish School Bd.; Reno *v.* 1154,1232
Botello *v.* United States 1112
Bounds *v.* United States 1198
Bourne *v.* Walt Disney Co. 1240
Bourne Co. *v.* Walt Disney Co. 1240
Bowen *v.* Arkansas 1226
Bowen *v.* Gundy 1123
Bower *v.* Bower 1105
Bowersox; Battle *v.* 1235
Bowersox; Harvey *v.* 1145
Bowersox; Jones *v.* 1109
Bowersox; Nave *v.* 1214
Bowersox; Oxford *v.* 1124,1252
Bowersox; Tyler *v.* 1152
Bowersox *v.* Williams 345
Bowersox; Williams *v.* 1129
Bowles *v.* Minnesota 1163
Bowron; Boggs *v.* 1134
Boyce *v.* Greenway 1244
Boyd *v.* Christian Methodist Episcopal Church 1248
Boyd; Hunter *v.* 1226
Boyd *v.* Mississippi 1236
Boyd *v.* North Carolina 1194
Boyd; Sellers *v.* 1111
Bracey *v.* Pennsylvania 1122
Bradford *v.* United States 1174
Bradley *v.* United States 1199
Bragg *v.* Bartlett 1110
Brake *v.* District Court of Appeal of Fla., Third Dist. 1151
Bramhall, *In re* 1217
Branch *v.* United States 1227
Brasseur *v.* Empire Travel Service, Inc. 1234
Bratton *v.* United States 1174
Braun *v.* Oklahoma 1144
Bravo *v.* National Mediation Bd. 1104

	Page
Brazil *v.* Dalton	1103
Breath *v.* United States	1239
Brennan; Owens-Corning Fiberglas Corp. *v.*	1243
Brett; Thornbrugh *v.*	1213
Brewer *v.* United States	1200
Brewer *v.* Ward	1164
Briggs *v.* United States	1124
Brinkley, *In re*	1117,1231
British Airways; Shafii *v.*	1161
Brito *v.* New York	1123
Britt *v.* Wells	1213
Britton *v.* United States	1105
Broach *v.* United States	1148
Broadwater *v.* Corbett	1137
Brobston *v.* Insulation Corp. of America	1209
Brockamp; United States *v.*	1232
Broida *v.* Horowitz	1150
Broida *v.* Smith	1151
Brooks *v.* Wichita Falls State Hospital	1214
Brookshire; Bell *v.*	1195
Brotherhood. For labor union, see name of trade.	
Broumas *v.* United States	1148
Brown, *In re*	1185
Brown *v.* Angelone	1124
Brown; Aronson *v.*	1209
Brown; Board of County Comm'rs of Bryan County *v.*	1154
Brown *v.* Campbell County Bd. of Ed.	1222
Brown; Furrer *v.*	1167
Brown; Guzman Zayas *v.*	1124,1205
Brown; Jardine *v.*	1185
Brown; LeFevre *v.*	1188
Brown *v.* Paskvan	1156
Brown *v.* Plywood Panels, Inc.	1168
Brown; Stearns-Miller *v.*	1225
Brown; Sudranski *v.*	1110,1205
Brown *v.* United States	1113,1114,1174
Brown *v.* U. S. Congress	1195
Brown; Wright *v.*	1159
Brown Group, Inc.; Food & Commercial Workers *v.*	544
Brown Shoe Co.; Food & Commercial Workers *v.*	544
Bruckner, *In re*	1207
Bruellisauer *v.* Colorado	1213
Brunner *v.* United States	1106
Brunston *v.* Johnson	1237

Page
Bryant *v.* United States 1111,1113
Bryson *v.* Oklahoma 1144
Buc-Hanan *v.* California 1212
Buchanan *v.* United States 1114
Buffalo Police Dept.; Batista *v.* 1109
Buividas *v.* United States 1160
Bullock *v.* United States 1126
Bunnell; Ramos *v.* 1171
Burke *v.* Ohio 1112
Burkhart *v.* Agostini 1221
Burks *v.* United States 1215
Burley *v.* McDonnell Douglas Helicopter Co. 1143,1216
Burnette *v.* United States 1229
Burr *v.* North Carolina 1123
Burrell; Graves *v.* 1142
Burress *v.* Unitarian-Universalist Society of Sacramento, Inc. 1169
Burt *v.* Illinois 1211
Bush *v.* Jones 1150
Bush *v.* Vera 952
Butler *v.* United States 1125
Butterfly *v.* United States 1215
Buyea *v.* United States 1157
Bynum *v.* State Farm Ins. Co. 1161
Byrd *v.* United States 1125
Caballero Ybarra *v.* United States 1174
Cabiles *v.* Office of Personnel Management 1139
Cafe 207, Inc. *v.* St. Johns County 1156
Cahill *v.* Department of Labor 1244
Cain; Cupit *v.* 1143
Cain; Derryberry *v.* 1212
Cain; Stephens *v.* 1143,1205
Cain; Taylor *v.* 1236
Cairnes *v.* United States 1173
Calderon *v.* California First Amendment Coalition 1182
Calderon; Hendricks *v.* 1111
Calderon; Williams *v.* 1183
Caldwell *v.* Arkansas 1124
Calhoun *v.* Allen 1247
Calhoun *v.* Huskisson 1182
Caliendo *v.* Rodriguez 1231
California; Banks *v.* 1142,1216
California; Barno *v.* 1158
California; Buc-Hanan *v.* 1212
California; Chamberlin *v.* 1224

Page
California; Cortez Escamilla *v.* 1159
California; Dawson *v.* 1196
California; Di Jorio *v.* 1110
California; Fauber *v.* 1106
California *v.* Federal Communications Comm'n 1216
California; Free *v.* 1123
California; Hawkins *v.* 1193
California; Helms *v.* 1212
California; Hill *v.* 1170
California; Lang *v.* 1248
California; Lowe *v.* 1193
California; Mitchell *v.* 1192
California; Patin *v.* 1124
California; Patterson *v.* 1124
California; Scott *v.* 1144
California; Siqueros *v.* 1159
California; Stanley *v.* 1208
California; Sultan *v.* 1141
California; Treadway *v.* 1212
California; Trippet *v.* 1197
California; Williams *v.* 1159
California Div. of Labor Stds. Enforcement *v.* Dillingham Constr. 1133
California First Amendment Coalition; Calderon *v.* 1182
California State Univ. at Los Angeles; Verdugo *v.* 1151
California Workers' Compensation Appeals Bd.; Debbs *v.* 1123
Califorrniaa *v.* Clinton 1204
Calisaan *v.* Office of Personnel Management 1139
Calles; Marian *v.* 1151
Calvert, *In re* 1185
Calvo *v.* U. S. Court of Appeals 1187
Cambridge Tankers, Inc.; De Los Santos *v.* 1209
Camilo *v.* United States 1161
Camp *v.* Gregory 1244
Camp; Gregory *v.* 1244
Camp *v.* United States 1162
Campbell; Gee *v.* 1248
Campbell *v.* Louisiana 1187
Campbell *v.* Texas 1140,1209
Campbell *v.* United States 1115,1147,1161,1228
Campbell County Bd. of Ed.; Brown *v.* 1222
Campisi *v.* Maffeo 1159
Cannon; McQueen *v.* 1247
Cannon; Nelson *v.* 1143
Cannon *v.* United States 1148

	Page
Cantrell *v.* Moore	1248
Capers *v.* United States	1211
Capistrano Unified School Dist.; Kletzelman *v.*	1191
Cargill, Inc., *In re*	1156
Carlisle *v.* United States	416
Carlisle Area School Dist.; Scott P. *v.*	1135
Carlson *v.* ICI Americas Inc.	1136
Carnahan; Fields *v.*	1109
Carpio *v.* Office of Personnel Management	1139
Carr *v.* United States	1121
Carrazana *v.* United States	1147
Carson *v.* Fauver	1249
Carson *v.* Waterfront Comm'n of N. Y. Harbor	1210
Carter; Americanos *v.*	1222
Carter *v.* Helmsley-Spear, Inc.	1208
Carter *v.* Montana Dept. of Transportation	1188
Carter *v.* Mrozowski	1135
Carter *v.* North Carolina	1225
Carter *v.* Runyon	1106
Carter *v.* United States	1184
Caruso *v.* Kelly	1103
Carvajal *v.* United States	1246
Casares *v.* Texas	1124
Casarotto; Doctor's Associates, Inc. *v.*	681
Casas *v.* United States	1148
Casella *v.* Equifax Credit Information Services	1150
Casey; Fred Meyer, Inc. *v.*	1156
Caspari; Craig *v.*	1107
Cassity *v.* Kentucky Transportation Cabinet	1209
Castner *v.* Whalen	1126
Castorena *v.* United States	1227
Castro; CSX Transportation, Inc. *v.*	1210
Castro-Vega *v.* United States	1112
Catalfo *v.* United States	1192
Catalina Enterprises, Inc. Pension Trust *v.* Hartford Fire Ins. Co.	1105
Catanio *v.* Myers	1248
Caterpillar Inc. *v.* Lewis	1133
Cathedral City; Hoesterey *v.*	1185
Caton *v.* Clarke	1173
Cavanaugh *v.* Johnson	1144
Cawley; Sharp *v.*	1124
Cayanan *v.* Office of Personnel Management	1139
Cayton, *In re*	1207
CBS "60 Minutes"; Auvil *v.*	1167

	Page
C & B Trucking *v.* Kentucky Transportation Cabinet	1209
Celestial Church of Christ, Inc. *v.* Chicago	1137
Center for Humanities, Inc.; Gasperini *v.*	1102
Center for Independence of Disabled; Dymits *v.*	1224
CenTra, Inc. *v.* Chandler Ins. Co.	1191
Central Cartage *v.* Central States, S. E. & S. W. Areas Pens. Fd.	1134
Central Ohio Joint Vocational School Dist.; J. A. Croson Co. *v.*	1155
Central States, S. E. & S. W. Areas Health and Welfare Fund *v.* Pathology Laboratories of Ark.	1233
Central States, S. E. & S. W. Areas Pens. Fd.; Central Cartage *v.*	1134
Central States, S. E. & S. W. Areas Pens. Fd.; Midwest Motor Express *v.*	1203
Central States, S. E. & S. W. Areas Pens. Fd. *v.* Sherwin-Williams	1190
Central Synagogue; Posner *v.*	1119
Century Mortgage Co.; Lewis *v.*	1237
Chamberlin *v.* California	1224
Chambers *v.* United States	1215
Champion; Dale *v.*	1170
Chan; Baijnath *v.*	1141
Chandler Ins. Co.; CenTra, Inc. *v.*	1191
Chapa *v.* Jim Wells County	1137
Chaplin *v.* United States	1243
Chara *v.* United States	1229
Chase Manhattan Bank, N. A.; Harris *v.*	1243
Chater; Gordon *v.*	1103
Chater; Lawson *v.*	1106,1204
Chater; Mangrum *v.*	1237
Chater; Roberts *v.*	1122
Chavez *v.* Housing Authority of El Paso	1188
Chavez *v.* United States	1116
Chavez *v.* University of Houston	1187
Chavez; University of Houston *v.*	1184
Chemetron Corp.; Jones *v.*	1137
Chemstar, Inc.; Liberty Mut. Ins. Co. *v.*	1219
Cheng *v.* Metropolitan Life Ins. Co.	1248
Cherokee Ins. Co. *v.* E. W. Blanch Co.	1156
Chevron U. S. A. Inc.; Hurinenko *v.*	1240
Chevron U. S. A. Inc.; United States *ex rel.* Fine *v.*	1233
Chicago; Celestial Church of Christ, Inc. *v.*	1137
Chicago Bd. of Ed.; Pittman *v.*	1243
Chicago Transit Authority; Radic *v.*	1247
Chick *v.* United States	1133
Chief Judge, Circuit Court of Fla., Leon County; Pearson *v.*	1237
Chief Judge, U. S. District Court; Reliford *v.*	1112

Page
Chief Justice, Supreme Court of Ill.; Palmisano *v.* 1223
Chief Justice, Supreme Court of Ohio; Scott *v.* 1226
Chief of National Guard Bureau; Tracy *v.* 1214
Childers; Simpson *v.* 1212
Chiles *v.* United States 1188
Chilli *v.* United States 1238
Choucair; McGeshick *v.* 1212
Christian Methodist Episcopal Church; Boyd *v.* 1248
Christopher *v.* Ohio 1247
Christy *v.* Cooper 1146
Chrost; Gucikova *v.* 1170
Chrysler Corp.; Kearns *v.* 1230
Church of Jesus Christ of Latter-day Saints; Igbo *v.* 1194
Ciapponi *v.* United States 1215
Cincinnati; Cook *v.* 1120
Cinergi Productions, Inc.; Fishburne *v.* 1134
Circuit Court of Wis., Marathon County; Jacobs *v.* 1251
Cisneros; Cost Control Marketing & Sales Management of Va. *v.* 1187
Citibank, N. A.; Lamb *v.* 1188
Citibank (S. D.), N. A.; Richardson *v.* 1244
Citibank (S. D.), N. A. *v.* Sherman 1241
Citibank (S. D.), N. A.; Smiley *v.* 735,1118,1154
City. See name of city.
Claassen *v.* United States 1211
Clapp, *In re* 1101
Clark *v.* Clarkstown Central School Dist. 1155
Clark *v.* Johnson 1147
Clark *v.* United States 1141
Clark Distributing Co.; Eades *v.* 1157
Clarke; Caton *v.* 1173
Clarkstown Central School Dist.; Clark *v.* 1155
Class of Gutierrez *v.* Santa Ana Unified School Dist. 1168
Claudio *v.* Snyder 1109
Claypool *v.* United States 1149
Clayton County Comm'n; King *v.* 1208
Clement *v.* Florida Bar 1210
Clements *v.* Babcock & Wilcox Co. 1136,1240
Clements *v.* United States 1229
Cleveland Tankers, Inc.; American S. S. Co. *v.* 1220
Clifford *v.* Glickman 1132
Clifton *v.* United States 1132
Clinard, *In re* 1217
Clinton; Califorrniaa *v.* 1204
Clinton *v.* Middlesex Mut. Assurance Co. 1104

	Page
Cluck *v.* Osherow	1142
Cobb; Taylor *v.*	1160
Coeur d'Alene Tribe of Idaho *v.* Idaho	1133
Coeur d'Alene Tribe of Idaho; Idaho *v.*	1132
Coffin *v.* United States	1147
Colbert *v.* Oklahoma	1109
Cole *v.* United States	1201
Coleman *v.* Hofbauer	1128
Coleman *v.* Murray	1160
Coleman *v.* New York Comm'n of Correction	1160
Coleman *v.* United States	1162
Coley *v.* United States	1169
Collado *v.* United States	1169
Collins; James *v.*	1184
Collins *v.* United States	1200
Collins; Worthey *v.*	1235
Colon *v.* Florida Comm'n on Ethics	1242
Colonial Beach; Melka Marine, Inc. *v.*	1245
Colonial Beach; Mitrano *v.*	1245
Colorado; Bruellisauer *v.*	1213
Colorado; Hutton *v.*	1168
Colorado; McWilliams *v.*	1148
Colorado Republican Federal Campaign Committee *v.* FEC	1117
Columbia County Redevelopment Authority; Noble *v.*	1119
Columbia County Sheriff's Dept.; Hughey *v.*	1160
Columbia Natural Resources, Inc.; Tatum *v.*	1163
Colvard *v.* Fulton-DeKalb Hospital Authority	1234
Combustion Engineering, Inc. *v.* Johansen	1217
Commissioner; Cramer *v.*	1244
Commissioner *v.* Hubert's Estate	1166
Commissioner; Hughes & Luce *v.*	1208
Commissioner; Kurnik *v.*	1222
Commissioner; Lane *v.*	1235
Commissioner; Levien *v.*	1245
Commissioner; Marcinek *v.*	1137
Commissioner; McNeel *v.*	1222
Commissioner; Nordvik *v.*	1192
Commissioner; Norwest Corp. *v.*	1203
Commissioner; Okolie *v.*	1161
Commissioner; Philip Morris Inc. *v.*	1220
Commissioner; Pressley *v.*	1223
Commissioner; Smith *v.*	1205
Commissioner; Webb *v.*	1244
Commissioner of Internal Revenue. See Commissioner.	

Page
Commissioner of Patents and Trademarks; Maresca *v.* 1115
Commodity Futures Trading Comm'n; Armstrong *v.* 1245
Commodity Futures Trading Comm'n; Dunn *v.* 1219
Commonwealth. See name of Commonwealth.
Comm-Tract Corp.; Tamburello *v.* 1222
Comptroller of Currency; First National Bank & Trust, Wibaux *v.* 1233
Concha; London *v.* 1183
Cong Pham *v.* Oklahoma 1141
Conley *v.* Eugene 1191
Conley; Rashi *v.* 1193
Connecticut; Cooper *v.* 1130,1214
Connecticut; Hickam *v.* 1221
Connick, *In re* 1101
Connor *v.* Flynn 1210
Connors; Petitte Brothers Mining Co. *v.* 1189
Consolidated Coin Caterers Corp.; O'Connor *v.* 308
Consolidated Rail Corp.; Idemudia *v.* 1172
Consolidation Coal Co.; Newman *v.* 1128
Construction Workers *v.* Murray 1219
Conti *v.* United States 1150
ContiCommodity Services, Inc.; Ragan *v.* 1104
Continental Ins.; Tam *v.* 1167
Continental Trend Resources, Inc.; OXY USA Inc. *v.* 1216
Contreras *v.* Stainer 1143
Cook *v.* Cincinnati 1120
Cook *v.* United States 1238
Cooper; Christy *v.* 1146
Cooper *v.* Connecticut 1130,1214
Cooper *v.* Groose 1107
Cooper; Hazen *v.* 1189
Cooper *v.* Malone 1109
Cooper *v.* Massachusetts Comm'r of Revenue 1221
Cooper; Neal *v.* 1197
Cooper *v.* Oklahoma 348
Cooper *v.* United States 1158
Copeland *v.* MBNA America Bank, N. A. 1243
Corbett; Broadwater *v.* 1137
Corces *v.* United States 1166
Corcoran *v.* United States 1228
Cordova, *In re* 1186
Coronel *v.* Office of Personnel Management 1140,1252
Corpuz *v.* Office of Personnel Management 1139
Correa *v.* United States 1249
Correa Gonzalez; Hospital San Francisco, Inc. *v.* 1136

Page
Corrections Commissioner. See name of commissioner.
Cortez Escamilla *v.* California 1159
Corti *v.* United States 1250
Cosmopolitan, Inc.; Sparky's Waterfront Saloon, Inc. *v.* 1189
Costa; Balandra Schiffahrts-Gesellschaft MBH & Co., KG *v.* 1245
Cost Control Marketing & Sales Management of Va. *v.* Cisneros 1187
Costello; Nunez *v.* 1195
Cotner *v.* Nichols 1123
Cotner *v.* Oklahoma 1193
Coto *v.* United States 1200
Cotton *v.* Nagle 1236
County. See name of county.
Coupar *v.* Turnbo 1126
Court of Appeals. See U. S. Court of Appeals.
Court of Appeals of Mich.; Kennedy *v.* 1160
Court of Civil Appeals of Ala.; Knight *v.* 1151
Couse *v.* United States 1249
Covillion *v.* New Hampshire 1204
Cox *v.* United States 1162
Crabtree *v.* Singletary 1161,1240
Craig, *In re* 1128
Craig *v.* Caspari 1107
Craig *v.* Montana 1195
Cramer *v.* Commissioner 1244
Crane Vessel Titan 5 *v.* Entron, Ltd. 1204
Crawford; Prieto *v.* 1223
Crawford *v.* Roane 1121
Crawley *v.* Pennsylvania 1212
C. R. Bard, Inc.; Talbott *v.* 1230
Crehan *v.* DeBoer 1156
Crispin *v.* United States 1239
Cristino Rivera Mining Co.; Simpson *v.* 1109,1163
Crocker; Union Security Life Ins. Co. *v.* 1230
Crompton *v.* United States 1106
Crooms *v.* Johnson 1213
Croson Co. *v.* Central Ohio Joint Vocational School Dist. 1155
Crowder, *In re* 1207
Crowe *v.* Georgia 1151
Crowe; Strickland *v.* 1223
Crow Tribe of Indians *v.* Repsis 1221
Csorba *v.* ITT Electro-Optical Products Division 1160,1252
CSX Transportation, Inc. *v.* Castro 1210
Cudal *v.* Office of Personnel Management 1211
Cullum *v.* Hawk 1122

	Page
Cully *v.* St. Augustine Manor	1188
Culver City; Young *v.*	1151
Cumming; Haney *v.*	1209
Cummings; Sledge *v.*	1145
Cupit *v.* Cain	1143
Curiale *v.* Sedwick	1152
Curley *v.* United States	1227
Current *v.* Oklahoma	1236
Curry *v.* E-Systems, Inc.	1203
Curtis *v.* United States	1137
Custodio *v.* Office of Personnel Management	1140
Cytron; Delbruegge *v.*	1117
Daas *v.* United States	1111
Dade County Auto Tag Office; Gowin *v.*	1191
Daguinotnot *v.* Office of Personnel Management	1138,1251
Dale *v.* Champion	1170
Dale *v.* Superior Court of Cal., San Luis Obispo County	1224
Daley *v.* Rambo	1157
D'Almeida; Stork Brabant B. V. *v.*	1168
Dalton; Brazil *v.*	1103
D'Amario *v.* Pine	1198
D'Ambrosio *v.* Ohio	1172
Damer; Pepper *v.*	1245
Dameron, *In re*	1184
Danao *v.* Office of Personnel Management	1139
Danger *v.* United States	1227
Danos *v.* United States	1162
Darden *v.* Barnett	1197
Darden *v.* United States	1149
Dart *v.* Dart	1168
Datagate, Inc.; Hewlett-Packard Co. *v.*	1115
Davenport *v.* Meloy	1144
David *v.* United States	1215
Davis; Anderson *v.*	1172
Davis; McClaran *v.*	1128
Davis *v.* Mississippi	1192
Davis *v.* Pennsylvania	1173
Davis *v.* Thompson	1237
Davis *v.* United States	1111,1210,1227
Dawson *v.* California	1196
Day, *In re*	1186
Dayton Area Visually Impaired Persons, Inc. *v.* Montgomery	1135
DeBarr *v.* Nevada	1192
Debbs *v.* California Workers' Compensation Appeals Bd.	1123

Page
DeBoer; Crehan *v.* 1156
De Buono *v.* NYSA–ILA Medical and Clinical Services Fund 1232
Dedes *v.* Page 1237
Deeble *v.* Dyslin 1236
De Galan; Ram *v.* 1115
Degen *v.* United States 820
De Guzman *v.* Office of Personnel Management 1211
De Jesus *v.* Office of Personnel Management 1138
Dela Rea *v.* Office of Personnel Management 1140
Delaware; Wright *v.* 1249
Delbridge *v.* New Jersey Division of Youth and Family Services 1146
Delbruegge *v.* Cytron 1117
DeLeon *v.* San Antonio Independent School Dist. 1108
DeLeon-Rodriguez *v.* United States 1115
Delgado *v.* United States 1214
Dellinger; Salzer *v.* 1122
Deloatch *v.* Hughes 1120,1204
Delos Reyes *v.* Office of Personnel Management 1141
De Los Santos *v.* Cambridge Tankers, Inc. 1209
Denvers *v.* United States 1163
Department of Air Force; Diaz *v.* 1208
Department of Air Force; Hill *v.* 1101
Department of Alcoholic Beverage Control; Moose Lodge #259 *v.* 1221
Department of Commerce; Francis *v.* 1224
Department of Commerce *v.* New York City 1
Department of Defense; Trivedi *v.* 1110
Department of Health and Human Services; Ortiz *v.* 1136
Department of Justice; Kelley *v.* 1166
Department of Labor; Cahill *v.* 1244
Department of Veterans Affairs; Marsh *v.* 1226
Depew *v.* Gummo 1190
Depperman *v.* Health Care Employees 1213
DeRewal *v.* United States 1134
Derryberry *v.* Cain 1212
Desiderio; Rogers *v.* 1164
DeYoung *v.* Kansas 1236
DeYoung *v.* Lorentz 1198
D. F.; United States *v.* 1231
Dias, *In re* 1232
Diaz *v.* Department of Air Force 1208
Diaz *v.* United States 1199
Dieguez-Alvarez *v.* United States 1138
Digby *v.* Followill 1144
Di Jorio *v.* California 1110

Page
Dilbert *v.* United States 1149
Dilley; Yeoman *v.* 1196
Dillingham Constr., N. A.; Cal. Div. of Labor Stds. Enf. *v.* 1133
Dilworth *v.* Illinois 1197
Dime Savings Bank of N. Y.; Glavey *v.* 1221
Dingle *v.* Victory Savings Bank 1122
Dinh Tran *v.* Dinh Truong Tran 1133
Dinh Tran; Dinh Truong Tran *v.* 1134
Dinh Truong Tran *v.* Tho Dinh Tran 1134
Dinh Truong Tran; Tho Dinh Tran *v.* 1133
Director, OWCP; Ingalls Shipbuilding, Inc. *v.* 1186,1243
Director of penal or correctional institution. See name or title of director.
Distajo *v.* Doctor's Associates, Inc. 1120
District Court. See U. S. District Court.
District Court of Appeal of Fla., First Dist.; Kleinschmidt *v.* 1226
District Court of Appeal of Fla., Third Dist.; Brake *v.* 1151
District Judge. See U. S. District Judge.
District of Columbia; Ifill *v.* 1169
Dixon; Jeter *v.* 1196
Dixon *v.* Maass 1125
Dixon *v.* United States 1167
Dobyne *v.* Alabama 1169
Doctor's Associates, Inc. *v.* Casarotto 681
Doctor's Associates, Inc.; Distajo *v.* 1120
Dodson; Metropolitan Edison Co. *v.* 1163
Doe; Sikora *v.* 1163
Dolcefino *v.* Ray 1121
Dolenz *v.* Southwest Media Corp. 1134,1240
Dolloph *v.* United States 1228
Dorsey *v.* United States 1239
Dostie *v.* Maine 1134
Doucet; Louisiana Dept. of Transportation and Development *v.* 1120
Douglas *v.* United States 1251
Downs *v.* United States 1111
Downs *v.* Virginia 1249
Doyle *v.* United States 1149
Dread *v.* Maryland State Police 1152
Dubuc *v.* Hopper 1142
Duckett *v.* Godinez 1158
Dudley; Owens-Corning Fiberglas Corp. *v.* 1244
Duell *v.* Utah 1247
Dukes *v.* United States 1198,1226
Dumas *v.* United States 1114

Page
Duncan; Usher *v.* 1197
Dungca *v.* Office of Personnel Management 1138
Dunn *v.* Commodity Futures Trading Comm'n 1219
Dunn; Rivens *v.* 1159
Dunn *v.* Singletary 1110
Dunn *v.* United States 1200
Dunstable-Groton Corp. *v.* Groton Planning Bd. 1137
Dupont; Florida *v.* 1190
Dupree; Lamar County Bd. of Ed. and Trustees *v.* 1241
Dupree; Moore *v.* 1241
Duquette *v.* Wisconsin 1201
Dushaw *v.* Roadway Express, Inc. 1120
Dutton; Pickle *v.* 1196
Dwyer *v.* Sparks 1194
Dykes *v.* Southeastern Pa. Transportation Authority 1142
Dymits *v.* Center for Independence of Disabled 1224
Dymits *v.* Grim 1236
Dyslin; Fraser Deeble *v.* 1236
Dyson *v.* Pawtucket 1192
Eades *v.* Clark Distributing Co. 1157
Eagerton *v.* Owner-Operator Independent Drivers Assn., Inc. 1121
Eames *v.* Small Business Administration 1210
Earl *v.* United States 1113
Easley *v.* United States 1113
Ebershoff; Shieh *v.* 1132,1218
Echols *v.* American Fork Investors 1204
Echols *v.* Thomas 1116
Eckberg, Lammers, Briggs, Wolff & Vierling; Kittler *v.* 1221
Edmond *v.* Robinson 1201
Edwards; Alton & Southern R. Co. *v.* 1221
Edwards *v.* Balisok 1166
Edwards *v.* United States 1158
Eickleberry *v.* United States 1152
Einhorn *v.* LaChance 1135
Eisner; 640 Broadway Renaissance Co. *v.* 1155
El Dorado County; Townzen *v.* 1122
Electrical Workers; Billberry *v.* 1142
Electrical Workers; Moore *v.* 1234
Electrolux Corp.; Godby *v.* 1120,1216
Elgendy *v.* Nehemiah Plan Homes Project 1106
Elias *v.* United States 1152
Elliott; Esparza *v.* 1163
Elliott *v.* United States 1127
Ellis *v.* United Airlines, Inc. 1245

Page
Ellis *v.* United States 1228
Elramly; Immigration and Naturalization Service *v.* 1154
Elrod *v.* United States 1173
Emerson; Bollman *v.* 1107
Emery *v.* Plantier 1197
Empire Travel Service, Inc.; Brasseur *v.* 1234
Engelking *v.* United States 1152
Entron, Ltd.; Crane Vessel Titan 5 *v.* 1204
Environmental Coalition of Ojai *v.* Secretary of Commerce 1245
Equal Employment Opportunity Comm'n; Ghent *v.* 1204
Equifax Credit Information Services; Casella *v.* 1150
Ernesto Espinosa *v.* United States 1122
Erwin *v.* United States 1251
Escamilla *v.* California 1159
Escamilla *v.* United States 1127
Escusa *v.* Office of Personnel Management 1142
Esmor Mansfield, Inc.; Amos *v.* 1110
Esparza *v.* Elliott 1163
Espinosa *v.* United States 1122
Estacio *v.* United States 1121
Estate. See name of estate.
Estes *v.* Namba 1144,1230
E-Systems, Inc.; Curry *v.* 1203
Ethicon, Inc.; United States Surgical Corp. *v.* 1164
Eugene; Conley *v.* 1191
Evans *v.* Kansas City School Dist. 1104
Evans; Romer *v.* 620
Evans; Thomas *v.* 1196
E. W. Blanch Co.; Cherokee Ins. Co. *v.* 1156
Ewing, *In re* 1131
Executive Comm., U. S. Dist. Ct., N. Dist. of Ill.; Palmisano *v.* 1223
Exxon Co., U. S. A. *v.* Sofec, Inc. 830
Exxon Corp. *v.* Youell 1251
Exxon Seamen's Union; SeaRiver Maritime, Inc. *v.* 1251
F.; United States *v.* 1231
Fabian *v.* Shade 1212
Fallini *v.* United States 1243
Fargo Women's Health Organization, Inc.; Vanyo *v.* 1168
Farmer *v.* Hawk 1147
Farmer; Messler *v.* 1247
Fauber *v.* California 1106
Fauls *v.* United States 1199
Faunce *v.* White 1212
Fauver; Carson *v.* 1249

Page
Fecht; Price Co. *v.* 1136
Federal Bureau of Investigation; Mata *v.* 1234
FCC; BellSouth Telecommunications, Inc. *v.* 1129,1240
FCC; California *v.* 1216
FCC *v.* Miller 1155
FCC; Miller *v.* 1155
FCC; Turner Broadcasting System, Inc. *v.* 1218
FDIC; Atherton *v.* 1101,1133,1182
FDIC; Bakker *v.* 1233
FDIC; Bank of America National Trust and Savings Assn. *v.* 1103
FDIC; Hanna *v.* 1103
FDIC; Hennessy *v.* 1103
FDIC; Lewis *v.* 1204
FDIC; Russell *v.* 1166
FEC; Colorado Republican Federal Campaign Committee *v.* 1117
FEC; Whitmore *v.* 1155
Federal Home Loan Mortgage Corp.; Hinchliffe *v.* 1209
Felker *v.* Thomas 1151
Felker *v.* Turpin 1182,1218
Felter; Roussos *v.* 1225
Felton *v.* United States 1125
Ferguson; Hamill *v.* 1125
Ferrer *v.* United States 1127
FGS Constructors, Inc. *v.* United States 1134
Fields *v.* Carnahan 1109
Fields *v.* Thompson 1198
Fields *v.* United States 1121
Fields; Webb *v.* 1143
Filamor *v.* Office of Personnel Management 1138
Fine *v.* Chevron U. S. A. Inc. 1233
Fink; Graven Auction Co. *v.* 1189
First Advantage Ins., Inc. *v.* Green 1116
First Federal Savings Bank; Osborne *v.* 1237
First National Bank & Trust, Wibaux *v.* Comptroller of Currency 1233
Fishburne *v.* Cinergi Productions, Inc. 1134
Fisoli; Funai *v.* 1212
Flamingo Hilton; Allard *v.* 1168
Flathead Valley Community College; Talley *v.* 1121,1216
Flemmings *v.* Morton 1152
Flinn *v.* Florida Bar 1157
Florentino *v.* Office of Personnel Management 1139,1252
Florida; Allen *v.* 1107
Florida; Augustin *v.* 1196
Florida; Barkett *v.* 1237

Page
Florida *v.* Dupont 1190
Florida *v.* Frazier 1190
Florida; Halstead *v.* 1128
Florida; Johnson *v.* 1159
Florida *v.* Jones 1136,1150
Florida *v.* Rayfield 1136
Florida; Rodriguez *v.* 1123,1205
Florida *v.* Seminole Tribe of Fla. 1133
Florida; Seminole Tribe of Fla. *v.* 44
Florida; Sobin *v.* 1109
Florida; Wootton *v.* 1249
Florida Bar; Clement *v.* 1210
Florida Bar; Flinn *v.* 1157
Florida Comm'n on Ethics; Colon *v.* 1242
Florida Power & Light Co.; Praxair, Inc. *v.* 1190
Fluehr *v.* United States 1137
Flynn, *In re* 1219
Flynn; Connor *v.* 1210
Flynn *v.* Garden City 1225
Flynn *v.* United States 1200
Followill; Digby *v.* 1144
Food & Commercial Workers *v.* Brown Group, Inc. 544
Food & Commercial Workers *v.* Brown Shoe Co. 544
Ford *v.* Minnesota 1125
Fordice; Ayers *v.* 1153
Ford Motor Co. *v.* Fulkerson 1229
Ford Motor Co. *v.* Sperau 1217
Foronda *v.* Office of Personnel Management 1141,1252
Fort Belknap Indian Community; Montana *v.* 1129
Fort Peck Assiniboine and Sioux Tribes *v.* Tubridy 1104
Fort Sanders Regional Medical Center; Hartsell *v.* 1120
Fort Sumter Tours, Inc. *v.* Babbitt 1220
Forty-Estremera *v.* United States 1162
44 Liquormart, Inc. *v.* Rhode Island 484
Foster *v.* Gilliam 1220
Foster *v.* Hope Medical Group for Women 1104
Foster; Shores *v.* 1158
$405,089.23 in U. S. Currency; United States *v.* 1102,1132,1154
Fox *v.* Hinson 1190
Fox *v.* United States 1115,1162
Fragoso; Hamilton *v.* 1170
Fraidin *v.* Weitzman 1219
Fraiser *v.* United States 1114
Francis *v.* Department of Commerce 1224

Page
Francis *v.* United States 1250
Frank *v.* United States 1113
Franklin *v.* Illinois 1122
Franklyn *v.* Vista del Mar 1169,1252
Fraser Deeble *v.* Dyslin 1236
Frazier; Florida *v.* 1190
Fred Meyer, Inc. *v.* Casey 1156
Free *v.* California 1123
Free *v.* U. S. Court of Appeals 1144
Freestone; Blessing *v.* 1186
French; Huang *v.* 1157
Fried *v.* Pennsylvania 1191
Friend *v.* United States 1152
Fromal *v.* Jackson 1151
Frost *v.* United States 1201
Fry *v.* Virginia 1110
Frye *v.* North Carolina 1123
Frymire; Ampex Corp. *v.* 1182
Fulkerson; Ford Motor Co. *v.* 1229
Fuller *v.* Texas 1248
Fulton-DeKalb Hospital Authority; Colvard *v.* 1234
Funai *v.* Frisoli 1212
Furrer *v.* Brown 1167
Gadson; Maryland *v.* 1203
Gallego-Sanchez *v.* Immigration and Naturalization Service 1151
Gallipeau *v.* Rhode Island 1199
Gambino *v.* United States 1187
Gamble *v.* Moore 1250
Garcia; Jones *v.* 1167
Garcia *v.* Office of Personnel Management 1141,1252
Garcia *v.* Riverdale Plating & Heat Treating Co. 1237
Garcia *v.* United States 1127,1239
Garden City; Flynn *v.* 1225
Gardner *v.* United States 1114
Garner *v.* Ohio 1147,1230
Garner; Vargas *v.* 1108
Garraghty; Artis *v.* 1225
Garrigan, *In re* 1242
Gasperini *v.* Center for Humanities, Inc. 1102
Gaston *v.* Viclo Realty Co. 1169
Gaylor *v.* United States 1211
Gee *v.* Campbell 1248
Gee; Price-El *v.* 1107
Geery *v.* Shelley School Dist. 1237

Page
General Dynamics Corp.; United States *ex rel.* Willis *v.* 1104
General Motors Corp.; Plott *v.* 1157
General Motors Corp. *v.* Tracy 1118
Genins, *In re* 1184
Genish *v.* United States 1169
Georgia; Andrews *v.* 1106
Georgia; Crowe *v.* 1151
Georgia; Morrow *v.* 1171
Georgia Dept. of Public Safety; Willis *v.* 1210
Georgia State Bd. of Pardons and Paroles; Andrews *v.* 1142
Georgia State Bd. of Pardons and Paroles; Polley *v.* 1107
Gerasolo *v.* Adherence Group, Inc. 1209
Gerdeman, *In re* 1165
Ghent *v.* Equal Employment Opportunity Comm'n 1204
Gibson *v.* Jones 1142
Gibson; Sutton *v.* 1191
Gibson *v.* United States 1173
Gilbert *v.* San Francisco Bay Area Rapid Transit Dist. 1108
Giles *v.* United States 1201
Gilkey *v.* Hill 1143
Gill *v.* Guam 1167
Gilliam; Foster *v.* 1220
Gillis; Johnson *v.* 1224
Gillis; Pringle *v.* 1227
Glasscock *v.* Utah 1247
Glavey *v.* Dime Savings Bank of N. Y. 1221
Glenn, *In re* 1131
Glenolden Borough; Smith *v.* 1167,1251
Glickman; Clifford *v.* 1132
Glickman *v.* Wileman Brothers & Elliott, Inc. 1232
Glickman; Wileman Brothers & Elliott, Inc. *v.* 1233
Globe Newspaper Co. *v.* United States 1166
Glover, *In re* 1131
Glucksberg; Washington *v.* 1241
Gobert *v.* United States 1114
Godby *v.* Electrolux Corp. 1120,1216
Goddard *v.* Kansas Director of Taxation on Assessment of Marijuana and Controlled Substances Tax 1208
Godinez; Duckett *v.* 1158
Godwin; Yates *v.* 1159,1230
Golb *v.* United States 1127
Gold *v.* Morrison-Knudsen Co. 1213
Gomez; Jones *v.* 1143
Gomez Toledo *v.* United States 1114

Page
Gonzales *v.* United States 1163
Gonzalez; Hospital San Francisco, Inc. *v.* 1136
Gonzalez *v.* Moises Luna and Associates 1222
Gonzalez *v.* United States 1110,1215
Gonzalez-Lerma *v.* United States 1114
Good; Jae *v.* 1159
Gooden *v.* United States 1229
Goodman *v.* Virginia 1147
Goodwin; Walp *v.* 1160
Gordon *v.* Chater 1103
Gore; BMW of North America, Inc. *v.* 559
Gorman *v.* McAninch 1106,1204
Gottfried, *In re* 1231
Government of Virgin Islands; Petersen *v.* 1231
Governor of Ala.; Tate *v.* 1108
Governor of Colo. *v.* Evans 620
Governor of Fla. *v.* United States 1188
Governor of La. *v.* Hope Medical Group for Women 1104
Governor of Miss.; Ayers *v.* 1153
Governor of N. Y.; McReynolds *v.* 1159
Governor of N. C.; Pope *v.* 899
Governor of N. C.; Shaw *v.* 899
Governor of S. D.; Hinkle *v.* 1109
Governor of S. D. *v.* Planned Parenthood, Sioux Falls Clinic 1174
Governor of Tex. *v.* Vera 952
Governor of Wis.; Bartley *v.* 1210
Gowin *v.* Dade County Auto Tag Office 1191
Graham *v.* Pennsylvania 1157
Graham *v.* Turpin 1171
Grant *v.* United States 1200
Grant-Chase *v.* New Hampshire 1140
Graven Auction Co. *v.* Fink 1189
Graves *v.* Burrell 1142
Graves *v.* Saunders 1249
Graves *v.* U. S. Court of Appeals 1124
Gray *v.* United States 1211
Graziani; James *v.* 1248
Great Falls Eye Surgery Center *v.* United States 1222
Green; First Advantage Ins., Inc. *v.* 1116
Green *v.* Housing Authority of New Orleans 1169
Green *v.* Mellon Bank, N. A. 1170
Green *v.* Morton 1198
Green *v.* Pennsylvania Municipal Service Co. 1222
Green *v.* 25th Judicial Dist. Probation Dept. 1240

Page
Green *v.* United Pentecostal Church International 1134,1240
Greenberg; Wolfberg *v.* 1219
Greene, *In re* 1207
Greenidge *v.* United States 1174
Greenway; Boyce *v.* 1244
Greenwood Trust Co. *v.* Hunter 1241
Greenwood Trust Co.; Stoorman *v.* 1244
Gregory *v.* Camp 1244
Gregory; Camp *v.* 1244
Gregory *v.* North Carolina 1108
Grennier *v.* Nagle 1173
Grievance Committee for Southern Dist. of N. Y.; Polur *v.* 1196
Griggs *v.* South Carolina Electric & Gas Co. 1156
Grim; Dymits *v.* 1236
Groner; Alligator Farms, Inc. *v.* 1120
Groose; Abdullah *v.* 1215
Groose; Cooper *v.* 1107
Groose; Hall *v.* 1115
Groton Planning Bd.; Dunstable-Groton Corp. *v.* 1137
GTE Northwest Inc.; Oregon Public Utility Comm'n *v.* 1155
Guam; Gill *v.* 1167
Gucikova *v.* Chrost 1170
Guerrero *v.* United States 1147
Guest *v.* Illinois 1204
Gumm *v.* Ohio 1204
Gummo; Depew *v.* 1190
Gundy; Bowen *v.* 1123
Gunn; Vargas *v.* 1107,1230
Gurley *v.* Swaim 1244
Gussin *v.* Nintendo of America, Inc. 1166
Guth, *In re* 1131
Guzman *v.* United States 1148
Guzman Zayas *v.* Brown 1124,1205
Gwinnett County School System; McGuffey *v.* 1172
Hackensack; Moretti *v.* 1210
Hadley; Baker *v.* 1233
Hadley *v.* Washington 1111
Hai Cong Pham *v.* Oklahoma 1141
Hairston *v.* United States 1200
Hakeem *v.* New York 1201
Hale; Secakuku *v.* 1168
Hall *v.* Groose 1115
Hall *v.* Indiana Dept. of Revenue 1210
Halstead *v.* Florida 1128

	Page
Haman *v.* King	1163
Hamill *v.* Ferguson	1125
Hamill; Harvey *v.*	1194
Hamilton *v.* Fragoso	1170
Hamlet *v.* United States	1155
Hammond *v.* Lindler	1226
Hampton; J. A. L. *v.*	1158
Han *v.* United States	1239
Hand *v.* United States	1162
Haney, *In re*	1154
Haney *v.* Cumming	1209
Hanks; Roberts *v.*	1194
Hanks; Taylor *v.*	1194
Hanlin *v.* American General Finance, Inc.	1121
Hanlin *v.* Superior Court of Cal., Santa Clara County	1121
Hanna *v.* Federal Deposit Ins. Corp.	1103
Hansen *v.* Nebraska	1249
Hansen *v.* United States	1105
Hansen's Estate *v.* New Haven	1189
Hanus *v.* Sears, Roebuck & Co.	1194
Harden *v.* United States	1114
Hardy *v.* Orlando	1139,1252
Hardy *v.* Pinkerton Security Services	1161
Hargett; Smith *v.*	1122
Harmony; Thomson *v.*	1105
Harper; Young *v.*	1219
Harrington; Independent Life & Accident Ins. Co. *v.*	1164
Harris *v.* Chase Manhattan Bank, N. A.	1243
Harris *v.* Johnson	1227
Harris *v.* Montgomery County Dept. of Social Services	1132
Harris *v.* United States	1238
Harris *v.* Virginia Beach	1167
Harris Corp.; Mulliholand *v.*	1172
Harrison *v.* United States	1158
Hart *v.* United States	1127
Hartford Fire Ins. Co.; Catalina Enterprises, Inc. Pension Trust *v.*	1105
Hartsell *v.* Fort Sanders Regional Medical Center	1120
Harvell; Blytheville School Dist. No. 5 *v.*	1233
Harvell *v.* Nagle	1225
Harvey *v.* Bowersox	1145
Harvey *v.* Hamill	1194
Harvey *v.* Schriro	1146
Harvey *v.* "United States Marshal Edmo"	1145
Harvey *v.* Washington	1196

	Page
Hasa *v.* Nevada	1226
Hassan *v.* United States	1114
Hatch *v.* Oklahoma	1235
Hathaway; Shieh *v.*	1132,1218
Hauser *v.* Internal Revenue Service	1111
Hawaii; Kiliona *v.*	1144
Hawes *v.* Virginia	1245
Hawk; Cullum *v.*	1122
Hawk; Farmer *v.*	1147
Hawkins *v.* California	1193
Hawkins *v.* United States	1149
Haws; Jennings *v.*	1110
Hayes; McQueen *v.*	1145
Hayes *v.* Spears	1170
Haynes *v.* United States	1227
Hazen *v.* Cooper	1189
Health Care Employees; Depperman *v.*	1213
Heller *v.* United States	1210
Helms *v.* California	1212
Helmsley-Spear, Inc.; Carter *v.*	1208
Helmstetter *v.* United States	1147
Henderson *v.* United States	654
Hendricks *v.* Calderon	1111
Hendricks; Kansas *v.*	1153
Hennessey *v.* Blalack	1190
Hennessy *v.* Federal Deposit Ins. Corp.	1103
Hentz *v.* Roberts	1225
Hernandez *v.* New Mexico	1128
Hernandez *v.* Starbuck	1223
Hernandez *v.* Van Oss	1213
Hernandez; Vasquez *v.*	1156
Hernandez-Vargas *v.* United States	1137
Herrera *v.* United States	1198
Herring; Marks *v.*	1170
Herring; Smith *v.*	1159
Hess *v.* MacAskill	1121
Hesse; Saathoff *v.*	1123
Hewitt; Stephen *v.*	1193
Hewlett-Packard Co. *v.* Datagate, Inc.	1115
Hickam *v.* Connecticut	1221
Hickok *v.* United States	1200
Hill *v.* California	1170
Hill *v.* Department of Air Force	1101
Hill; Gilkey *v.*	1143

Page
Hill *v.* King 1142
Hill; Martin *v.* 1109
Hill *v.* Pennsylvania 1235
Hill *v.* San Mateo County Youth and Family Services Division . . 1170
Hill *v.* Schroubroek 1109
Hill *v.* United States 1105
Hills, *In re* 1130
Hilton Davis Chemical Co.; Warner-Jenkinson Co. *v.* 1218
Hinchliffe *v.* Federal Home Loan Mortgage Corp. 1209
Hines *v.* Roach 1108
Hinkle *v.* Janklow 1109
Hinojosa *v.* Johnson 1198
Hinson; Fox *v.* 1190
Hirsh, *In re* 1185
Hodges; Reliford *v.* 1112
Hodges *v.* United States 1161
Hoesterey *v.* Cathedral City 1185
Hofbauer; Coleman *v.* 1128
Hogan; Lake Barrington *v.* 1136
Hoke *v.* Bludworth 1221
Holden Living Trust *v.* Joint City-County Bd. of Tax Assessors 1167
Holly Farms Corp. *v.* National Labor Relations Bd. 392
Holmes *v.* Johnson 1190
Holmes *v.* South Carolina 1248
Holmes *v.* United States 1188
Holmes Bi-Rite Supermarket *v.* United States 1188
Holvey; Jones *v.* 1108
Home Ins. Co.; Berkeley *v.* 1208
Honda Motor Co. *v.* Oberg 1219
Hook; Arizona *v.* 1190
Hooks *v.* Oklahoma 1145
Hooper *v.* United States 1192
Hoover; Kiowa Tribe of Okla. *v.* 1188
Hope *v.* Illinois 1223
Hope *v.* United States 1215
Hope Medical Group for Women; Foster *v.* 1104
Hopkins; Lyman *v.* 1197
Hopkins; Nelson *v.* 1146
Hopper; Dubuc *v.* 1142
Horowitz; Broida *v.* 1150
Horton *v.* United States 1115
Hosier *v.* Wolff 1197
Hospitality Investments of Philadelphia, Inc. *v.* Pennsylvania State
  Police, Bureau of Liquor Control Enforcement 1206

Page
Hospital San Francisco, Inc. *v.* Correa Gonzalez 1136
House *v.* Tennessee 1193
Houser *v.* United States 1145
Housing Authority of El Paso; Chavez *v.* 1188
Housing Authority of Kansas City; Morris *v.* 1236
Housing Authority of New Orleans; Green *v.* 1169
Howard *v.* United States 1215
Howard County Sheriff's Dept.; Pruitt *v.* 1235
Howell *v.* Koch 1108
Hoxsie *v.* Kerby 1145
Hoyett *v.* Jones 1194,1198
Huang *v.* French 1157
Hubert's Estate; Commissioner *v.* 1166
Hudson *v.* United States 1228
Huffman; Terry *v.* 1143
Huffman *v.* United States 1215
Hufstetler *v.* United States 1127
Hughes; Deloatch *v.* 1120,1204
Hughes Aircraft Co. *v.* United States *ex rel.* Schumer 1218
Hughes, Hubbard & Reed; Shearson Lehman Brothers, Inc. *v.* 1245
Hughes & Luce *v.* Commissioner 1208
Hughes Salaried Retirees Action Committee *v.* Administrator, Hughes Non-Bargaining Retirement Plan 1189
Hughey *v.* Columbia County Sheriff's Dept. 1160
Humphrey; Pourzandvakil *v.* 1204
Hundley; Wyldes *v.* 1172
Hunt; Pope *v.* 899
Hunt; Shaw *v.* 899
Hunter *v.* Boyd 1226
Hunter; Greenwood Trust Co. *v.* 1241
Hunter *v.* United States 1149
Hurel Guerrero *v.* United States 1147
Hurinenko *v.* Chevron U. S. A. Inc. 1240
Hurst *v.* Supreme Court of Cal. 1171
Hurtado-Gonzalez *v.* United States 1250
Huskisson; Calhoun *v.* 1182
Hutching *v.* United States 1127,1227,1246
Hutton *v.* Colorado 1168
Huu To *v.* Rubin 1235
Hyatt Regency Phoenix Hotel Co.; Winston & Strawn *v.* 1234
Hyde *v.* United States 1238
Hyles; All American Asphalt *v.* 1188
Hyman *v.* Virginia Dept. of Taxation 1128
Hyppolite *v.* United States 1162

Page
Iadarola *v.* New York 1209
Ibalio *v.* Office of Personnel Management 1138
ICI Americas Inc.; Carlson *v.* 1136
ICI Americas, Inc.; Kemmerer *v.* 1209
Idaho; Blair *v.* 1111
Idaho *v.* Coeur d'Alene Tribe of Idaho 1132
Idaho; Coeur d'Alene Tribe of Idaho *v.* 1133
Idaho *v.* Lankford 1128
Idaho *v.* Stuart 1234
Idemudia *v.* Consolidated Rail Corp. 1172
Idowu *v.* United States 1239
Ifill *v.* District of Columbia 1169
Igbo *v.* Church of Jesus Christ of Latter-day Saints 1194
Illinois; Antonelli *v.* 1111
Illinois; Burt *v.* 1211
Illinois; Dilworth *v.* 1197
Illinois; Franklin *v.* 1122
Illinois; Guest *v.* 1204
Illinois; Hope *v.* 1223
Illinois; Kotsias *v.* 1222
Illinois *v.* Montanez 1251
Illinois; Pudlo *v.* 1137
Illinois; Sedano *v.* 1172
Illinois; Sewell *v.* 1145
Illinois; Sims *v.* 1172
Illinois; Taylor *v.* 1140
Illinois; Trujillo *v.* 1121
Illinois; Wheeler *v.* 1193
Immigration and Naturalization Service; Bandura *v.* 1105
Immigration and Naturalization Service *v.* Elramly 1154
Immigration and Naturalization Service; Gallego-Sanchez *v.* 1151
Immigration and Naturalization Service; Soler-Somahano *v.* 1144
Independent Life & Accident Ins. Co. *v.* Harrington 1164
Indiana Dept. of Correction *v.* Sampley 1220
Indiana Dept. of Revenue; Hall *v.* 1210
Industrial Comm'n of Ariz.; Morales *v.* 1233
Infotechnology, Inc.; Abeles *v.* 1156
Ingalls Shipbuilding, Inc. *v.* Director, OWCP 1186,1243
In re. See name of party.
Insulation Corp. of America; Brobston *v.* 1209
Internal Revenue Service; Baker *v.* 1192
Internal Revenue Service; Hauser *v.* 1111
International. For labor union, see name of trade.
International Amb. Programs; Archexpo Com. & Ind. Centre *v.* 1167

Page
International Business Machines Corp.; Misek-Falkoff *v.* 1111,1230
International Business Machines Corp.; United States *v.* 843
Iowa; Seehan *v.* 1173
Iowa; Swartz *v.* 1172
Iowa; Walker *v.* 1109
Iowa Bd. of Medical Examiners; Rosen *v.* 1104
Iowa Dept. of Corrections; Tharp *v.* 1135
Iowa-Missouri Conference of Seventh-day Adventists; Pierce *v.* .. 1220
Irons *v.* Karceski 1189
Isaac *v.* Taylor 1238
Isla *v.* Office of Personnel Management 1139
Israel Identity Tours, Inc.; Israel Travel Advisory Service, Inc. *v.* 1220
Israel Travel Advisory Service, Inc. *v.* Israel Identity Tours, Inc. 1220
ITT Electro-Optical Products Division; Csorba *v.* 1160,1252
Ivkovich; Walsh *v.* 1168
Ivy *v.* United States 1198
J.; M. L. B. *v.* 1118,1185
Jackson *v.* Alabama 1247
Jackson; Fromal *v.* 1151
Jackson *v.* Johnson 1124,1205
Jackson *v.* Ohio 1214
Jackson *v.* United States 1128,1139,1147,1157,1192,1229
Jacob *v.* Metrolaser, Inc. 1234
Jacobs *v.* Circuit Court of Wis., Marathon County 1251
Jacobs *v.* Kern Community College Dist. 1135
Jacques *v.* Rhode Island 1212
J. A. Croson Co. *v.* Central Ohio Joint Vocational School Dist. ... 1155
Jae *v.* Good 1159
Jaffer *v.* Board of Managers of Revere Condominium 1171
J. A. L. *v.* Hampton 1158
James, *In re* 1219
James *v.* Collins 1184
James *v.* Graziani 1248
James *v.* State Bar of Cal. 1143
James; Tate *v.* 1108
James *v.* United States 1199
Janklow; Hinkle *v.* 1109
Janklow *v.* Planned Parenthood, Sioux Falls Clinic 1174
Janneh *v.* The Regency 1224
Jardine *v.* Brown 1185
Jedrzejewski *v.* Menacker 1212
Jefferson County; Richards *v.* 793
Jeffress *v.* Suter 1194
Jenkins *v.* New Mexico Securities Division 1150

	Page
Jenkins; Wesley *v.*	1194
Jennings, *In re*	1153
Jennings *v.* Haws	1110
Jennings *v.* United States	1125,1228
Jensen *v.* Santa Clara County	1157
Jensen *v.* United States	1169
Jersey Carting, Inc. *v.* Board of Regulatory Comm'rs of N. J.	1135
Jervis *v.* United States	1158
Jespersen *v.* United States	1169
Jessup *v.* Blackfeet Tribe of Blackfeet Reservation	1129
Jeter *v.* Dixon	1196
Jim W. *v.* Margene L.	1226
Jim Wells County; Chapa *v.*	1137
Jiricko *v.* Lakin & Herndon	1137
Johansen; Combustion Engineering, Inc. *v.*	1217
Johnson *v.* Aaron	1236
Johnson; Ables *v.*	1198
Johnson; Abrams *v.*	1207,1241
Johnson; Beets *v.*	1157,1252
Johnson; Belyeu *v.*	1144
Johnson; Brunston *v.*	1237
Johnson; Cavanaugh *v.*	1144
Johnson; Clark *v.*	1147
Johnson; Crooms *v.*	1213
Johnson *v.* Florida	1159
Johnson *v.* Gillis	1224
Johnson; Harris *v.*	1227
Johnson; Hinojosa *v.*	1198
Johnson; Holmes *v.*	1190
Johnson; Jackson *v.*	1124,1205
Johnson *v.* Johnson	1122,1128,1171,1224
Johnson; Johnson-Bey *v.*	1195
Johnson; Lemon *v.*	1182
Johnson; Locke *v.*	1224
Johnson; Luken *v.*	1196
Johnson; Martin *v.*	1117
Johnson; McClelland *v.*	1214
Johnson; McDonald *v.*	1205
Johnson; Montoya *v.*	1133
Johnson *v.* New York	1172
Johnson; Nunez *v.*	1142
Johnson; Ramer *v.*	1170
Johnson *v.* Reed	1150
Johnson; Rogers *v.*	1235

Page
Johnson; Sherman *v.* 1205
Johnson; Stitt *v.* 1212
Johnson; Tedder *v.* 1194
Johnson *v.* United States 1113,1115,1149,1158,1162
Johnson; United States *v.* 1207
Johnson *v.* Welby 1205
Johnson; West *v.* 1198
Johnson-Bey *v.* Johnson 1195
Joint City-County Bd. of Tax Assessors; Holden Living Trust *v.* 1167
Jones, *In re* 1165,1218
Jones *v.* ABC–TV 1132
Jones *v.* American Civil Liberties Union Foundation 1118,1186
Jones *v.* Bowersox 1109
Jones; Bush *v.* 1150
Jones *v.* Chemetron Corp. 1137
Jones; Florida *v.* 1136,1150
Jones *v.* Garcia 1167
Jones; Gibson *v.* 1142
Jones *v.* Gomez 1143
Jones *v.* Holvey 1108
Jones; Hoyett *v.* 1194,1198
Jones *v.* Oklahoma 1122
Jones *v.* United States 1198
Jones *v.* Washington 1195
Jordan *v.* United States 1157
Joseph *v.* United States 1114
Joseph A.; New Mexico Dept. of Human Services *v.* 1190
Joyce *v.* United States 1161
Juarez *v.* Lee 1223
Judge, District Court of Appeal of Fla., First Dist.; Rodriguez *v.* 1204
Judge, District Court of Appeal of Fla., Fourth Dist.; Messler *v.* 1247
Judge, District Court of Kan., 31st Dist.; DeYoung *v.* 1198
Judge, District Court of Tex., Potter County; Bollman *v.* 1107
Judge, Jefferson County District Court; Swendra *v.* 1196
Judge, Justice Court of Sunflower County; Graves *v.* 1142
Judge, Superior Court of Cal., San Joaquin County; Hernandez *v.* 1213
Judge, Superior Court of Ga., Chattahoochee County; Digby *v.* 1144
Judge, Superior Court of Ga., Gwinnett County; McCauley *v.* 1149
Judge, Tulsa County; Dubuc *v.* 1142
Justice *v.* United States 1201
Kaczynski *v.* United States 1186
Kailey *v.* Norton 1193
Kakita; Shieh *v.* 343,1186
Kane *v.* Magna Mixer Co. 1220

Page
Kane; Magna Mixer Co. *v.* 1220
Kansas; DeYoung *v.* 1236
Kansas *v.* Hendricks 1153
Kansas City; McCarthy *v.* 1108,1240
Kansas City School Dist.; Evans *v.* 1104
Kansas Director of Taxation on Assessment of Marijuana and Controlled Substances Tax; Goddard *v.* 1208
Karageorgos *v.* Beach, Cadigan & Martin 1143
Karceski; Irons *v.* 1189
Karimi *v.* United States 1251
Kasenow; Riggins *v.* 1225
Katz & Associates; Vrba *v.* 1213
Kaylo; McCormick *v.* 1151
Keane; Warren *v.* 1248
Kearns *v.* Chrysler Corp. 1230
Kee *v.* Argus Life Ins. Co. 1107
Keeffe; Linehan *v.* 1246
Kelleher, *In re* 1165
Keller; Misek-Falkoff *v.* 1252
Kelley *v.* Department of Justice 1166
Kelley *v.* New York 1200
Kellotat *v.* United States 1161
Kelly, *In re* 1131
Kelly; Caruso *v.* 1103
Kelly; Metcalfe *v.* 1168
Kelly *v.* Penson 1210
Kemmerer *v.* ICI Americas, Inc. 1209
Kendricks *v.* United States 1163
Kennebec County; Struck *v.* 1168
Kennedy, *In re* 1163
Kennedy *v.* Court of Appeals of Mich. 1160
Kennedy *v.* United States 1119
Kentucky; McCreary *v.* 1135
Kentucky; Sanborn *v.* 1223
Kentucky Revenue Cabinet; St. Ledger *v.* 1206
Kentucky Transportation Cabinet; Cassity *v.* 1209
Kentucky Transportation Cabinet; C & B Trucking *v.* 1209
Kerby; Hoxsie *v.* 1145
Kern Community College Dist.; Jacobs *v.* 1135
Key West; Mertz *v.* 1119
Kiliona *v.* Hawaii 1144
Kimbrough *v.* United States 1157
Kincade; Blue Springs *v.* 1166
Kincheloe; LaPierre *v.* 1227

Page
King *v.* Clayton County Comm'n 1208
King; Haman *v.* 1163
King; Hill *v.* 1142
King; Morris *v.* 1193
King Instrument Corp.; Perego *v.* 1188
Kinley *v.* Ohio 1106
Kiowa Tribe of Okla. *v.* Hoover 1188
Kissane *v.* Trippett 1199
Kittler *v.* Eckberg, Lammers, Briggs, Wolff & Vierling 1221
Klat *v.* San Diego County 1130
Klauser; Balele *v.* 1172
Kleinschmidt *v.* District Court of Appeal of Fla., First Dist. 1226
Kletzelman *v.* Capistrano Unified School Dist. 1191
Knapp Shoes Inc. *v.* Sylvania Shoe Mfg. Corp. 1245
Knight *v.* Court of Civil Appeals of Ala. 1151
Knight *v.* United States 1173
Knight *v.* United States Fidelity & Guaranty Ins. Co. 1134
Knight Steel Fabricators *v.* U. S. Fidelity & Guaranty Ins. 1134
Kobayashi *v.* Nakamura 1210
Koch; Howell *v.* 1108
Koffiel *v.* Singletary 1160
Kornahrens *v.* Moore 1171
Kornblum; St. Louis County *v.* 1189
Kotsias *v.* Illinois 1222
Kowalski *v.* Oregon State Bar 1108,1230
Krieger; Shieh *v.* 343,1186
Kroger Co.; Mosier *v.* 1220
Kuhlmann; Smith *v.* 1216
Kuhn; Ollie *v.* 1238
Kurnik *v.* Commissioner 1222
Kussair *v.* United States 1163
Kwong *v.* United States 1115
L. *v.* Hampton 1158
L.; Jim W. *v.* 1226
Labor Union. See name of trade.
LaChance; Einhorn *v.* 1135
Lacombe; Nash *v.* 1171
Lake Barrington *v.* Hogan 1136
Lakin & Herndon; Jiricko *v.* 1137
Lamar County Bd. of Ed. and Trustees *v.* Dupree 1241
Lamb *v.* Citibank, N. A. 1188
Lancour *v.* Moore 1195
Lane *v.* Commissioner 1235
Lane; Olsen *v.* 1158,1252

Page
Lane *v.* United States 1112
Lang *v.* California 1248
Lankford; Idaho *v.* 1128
LaPierre *v.* Kincheloe 1227
Larrabee *v.* New York 1171
Law *v.* Law 1151
Lawhorn *v.* United States 1115
Lawrence *v.* United States 1243
Lawson *v.* Chater 1106,1204
Lawson *v.* Vera 952
Leary; Rodenbaugh *v.* 1223
LeBon *v.* United States 1249
Lebron *v.* National Railroad Passenger Corp. (AMTRAK) 1188
Lee; Juarez *v.* 1223
Lee *v.* Pennsylvania 1211
LeFevre *v.* Brown 1188
Lehtinen *v.* Quantum Chemical Corp. 1244
Lemon *v.* Johnson 1182
Levario *v.* State Bar of Tex. 1218
Levien *v.* Commissioner 1245
Levine *v.* United States 1225
Lewis; Caterpillar Inc. *v.* 1133
Lewis *v.* Century Mortgage Co. 1237
Lewis *v.* Federal Deposit Ins. Corp. 1204
Lewis; Spychala *v.* 1223
Lewter; Perry *v.* 1136
Liberty Mut. Ins. Co. *v.* Chemstar, Inc. 1219
Libman Co. *v.* Vining Industries, Inc. 1234
Libutti *v.* United States 1121
Liggins *v.* Ohio Dept. of Development 1148
Lincoln; Stevens *v.* 1196
Lindenmeier *v.* Siemens Power Corp. 1221
Lindler; Hammond *v.* 1226
Linehan *v.* Keeffe 1246
Linton *v.* Alaska 1197
Linton; St. Peter Villa, Inc. *v.* 1155
Little *v.* United States 1200
Litz *v.* Thomas 1135,1240
Liu *v.* New York City Police Dept. 1167
Lloyd *v.* United States 1250
Local. For labor union, see name of trade.
Locke *v.* Johnson 1224
Lockheed Corp. *v.* Spink 882,1118
Lohr *v.* Medtronic, Inc. 1118

Page
Lohr; Medtronic, Inc. *v.* 1118
Lonchar *v.* Thomas 314
London *v.* Concha 1183
London *v.* United States 1155
Longshoremen; Minetti *v.* 1170
Lopez *v.* Monterey County 1118
Lopez *v.* United States 1228
Lorentz; DeYoung *v.* 1198
Lorenz, *In re* 1205,1232
Los Angeles; Baxter *v.* 1249
Los Angeles; Ruvalcaba *v.* 1216
Los Angeles County Dept. of Children and Family Servs.; Rios *v.* 1234
Louisiana; Campbell *v.* 1187
Louisiana; Sanders *v.* 1246
Louisiana Dept. of Transportation and Development *v.* Doucet 1120
Louisiana Public Service Comm'n; Benoit *v.* 1117
Love *v.* United States 1239
Love; Williams *v.* 1192
Loving *v.* United States 748
Lowe *v.* California 1193
Lowe *v.* United States 1228
Lowenschuss *v.* Resorts International, Inc. 1243
Lucas *v.* Thompson 1247
Lucien *v.* Washington 1108
Ludmer; Nernberg *v.* 1220
Lugo; Reyes *v.* 1119
Luken *v.* Johnson 1196
Luna and Associates; Gonzalez *v.* 1222
Lussier *v.* United States 1105
Lyman *v.* Hopkins 1197
Lynce *v.* Mathis 1186
Lynch *v.* North Carolina 1143,1252
Lyon *v.* Alabama State Bar 1105
Maass; Dixon *v.* 1125
MacArmour *v.* United States 1147
MacAskill; Hess *v.* 1121
Mack *v.* Skupniewitz 1124
Madden *v.* Savage 1213
Madison; Silva *v.* 1121
Maffeo; Campisi *v.* 1159
Magante *v.* Office of Personnel Management 1140
Maglalang *v.* Office of Personnel Management 1140
Magna Mixer Co. *v.* Kane 1220
Magna Mixer Co.; Kane *v.* 1220

Page
Mahern; Ohio Agricultural Commodity Depositors Fund *v.* 1130
Maine; Dostie *v.* 1134
Maine; Sevigny *v.* 1107,1158
Malloy *v.* United States 1197
Malone; Cooper *v.* 1109
Malone *v.* United States 1216
Management Co. Entertainment Group; Weinberg *v.* 1191
Mangrum *v.* Chater 1237
Mangrum *v.* Simmons 1159
Marathon Oil Co.; Motley *v.* 1190
Marchese *v.* United States 1246
Marcinek *v.* Commissioner 1137
Marcus, *In re* 1131
Maresca *v.* Commissioner of Patents and Trademarks 1115
Margene L.; Jim W. *v.* 1226
Marian *v.* Calles 1151
Markman *v.* Westview Instruments, Inc. 370
Markovitch, *In re* 1184
Marks *v.* Herring 1170
Marsh *v.* Department of Veterans Affairs 1226
Marshall *v.* United States 1211
Martin *v.* Hill 1109
Martin *v.* Johnson 1117
Martin *v.* United States 1161,1251
Martinez, *In re* 1152
Martinez *v.* Oklahoma 1209
Martinez *v.* United States 1114,1148
Martinez-Martinez *v.* United States 1115
Martorano *v.* United States 1235
"Mary"; "Bob" *v.* 1156
Maryboy *v.* Utah State Tax Comm'n 1220
Maryland; Baker *v.* 1169
Maryland *v.* Gadson 1203
Maryland State Police; Dread *v.* 1152
Mason *v.* United States 1239
Massachusetts; McLaughlin *v.* 1226
Massachusetts; Wornum *v.* 1214
Massachusetts Comm'r of Revenue; Cooper *v.* 1221
Mata *v.* Federal Bureau of Investigation 1234
Mata; McQueen *v.* 1224
Mates *v.* Occupational Safety and Health Administration 1105,1204
Mathis; Lynce *v.* 1186
Matthews *v.* United States 1125,1235
Mattison *v.* Roach 1225

Page

Mattos *v.* United States 1215

Mauricio *v.* Office of Personnel Management 1138

Mauro *v.* United States 1126,1252

Maxwell, *In re* 1219

Maybeck *v.* United States 1161

Maydak *v.* Wener 1236

Mayles *v.* United States 1112

Mayo *v.* Office of Personnel Management 1140

Mayor of Baltimore City; Anheuser-Busch, Inc. *v.* 1206

Mays *v.* United States 1246

Mazurkiewicz; Zilich *v.* 1248

MBNA America Bank, N. A.; Copeland *v.* 1243

McAninch; Gorman *v.* 1106,1204

McBride; Smith *v.* 1170

McBride *v.* Thompson 1108

McBride *v.* United States 1127

McCarthy *v.* Kansas City 1108,1240

McCarthy *v.* United States 1126

McCarver *v.* North Carolina 1110

McCastle *v.* United States 1246

McCaughtry; Bergmann *v.* 1126,1160,1205,1240

McCauley *v.* Winegarden 1149

McClaran *v.* Davis 1128

McClelland *v.* Johnson 1214

McClelland *v.* United States 1148

McCloskey, *In re* 1131

McCollough; Bergmann *v.* 1141,1230

McCormack *v.* Thompson 1173

McCormick *v.* Kaylo 1151

McCreary *v.* Kentucky 1135

McCutcheon *v.* United States 1199

McDade; Price *v.* 1197

McDaniel *v.* McKenna 1150

McDonald *v.* Johnson 1205

McDonnell Douglas Helicopter Co.; Burley *v.* 1143,1216

McElrath *v.* Phillips 1165

McFarland *v.* Texas 1169

McGeshick *v.* Choucair 1212

McGuffey *v.* Gwinnett County School System 1172

McIntyre *v.* United States 1199

McKenna; McDaniel *v.* 1150

McKenna *v.* Twin Cities Area New Party 1219

McKenzie *v.* United States 1127

McLaughlin *v.* Massachusetts 1226

	Page
McLaughlin *v.* North Carolina Bd. of Elections	1104
McLeod *v.* News-Register Publishing Co.	1116
McLeod *v.* Oregon Lithoprint, Inc.	1116
McMahan & Co.; Wherehouse Entertainment, Inc. *v.*	1190
McMillan *v.* United States	1235
McNeel *v.* Commissioner	1222
McNelton *v.* Nevada	1212
McQueen, *In re*	1151
McQueen *v.* Cannon	1247
McQueen *v.* Hayes	1145
McQueen *v.* Mata	1224
McQueen *v.* Turner	1224
McReynolds *v.* Pataki	1159
McWilliams *v.* Colorado	1148
Medina *v.* Singletary	1247
Medina-Acevedo *v.* United States	1249
Medlock *v.* United States	1228
Medtronic, Inc. *v.* Lohr	1118
Medtronic, Inc.; Lohr *v.*	1118
Meeks *v.* United States	1112
Melahn; Warmus *v.*	1241
Melancon *v.* Rader	1194
Melka Marine, Inc., *In re*	1232
Melka Marine, Inc. *v.* Colonial Beach	1245
Melkonian *v.* Truck Ins. Exchange	1151
Mellon Bank, N. A.; Green *v.*	1170
Meloy; Davenport *v.*	1144
Meloy; Robinson *v.*	1158,1230
Menacker; Jedrzejewski *v.*	1212
Mendoza-Figueroa *v.* United States	1151
Menken *v.* United States	1187
Menna's Estate *v.* St. Agnes Medical Center	1165
Mercer *v.* Monzack	1103
Merkle; Aleali *v.*	1212
Mertz *v.* Key West	1119
Messler *v.* Farmer	1247
Metcalfe *v.* Kelly	1168
Metcalfe *v.* Metcalfe	1168
Methodist Hospital of Ind.; Tinsley *v.*	1146
Metrolaser, Inc.; Jacob *v.*	1234
Metropolitan Edison Co. *v.* Dodson	1163
Metropolitan Life Ins. Co.; Cheng *v.*	1248
Meyer *v.* National Solid Wastes Management Assn.	1119
Meyer, Inc. *v.* Casey	1156

Page
Micci, *In re* 1117,1231
Michigan; Bennis *v.* 1163
Michigan Attorney Grievance Comm'n; Pitsch *v.* 1172
Middlesex Mut. Assurance Co.; Clinton *v.* 1104
Midwest Motor Express *v.* Central States, S. E. & S. W. Areas Pens. Fd. 1203
Mier *v.* Van Dyke 1103
Miller *v.* AmSouth Bancorp., N. A. 1213
Miller *v.* Federal Communications Comm'n 1155
Miller; Federal Communications Comm'n *v.* 1155
Miller; National Assn. of Broadcasters *v.* 1155
Miller *v.* Oklahoma 1213
Miller *v.* Oregon State Prison 1161
Miller *v.* Purkett 1136
Miller; Slaton *v.* 1214
Miller *v.* Tennessee 1146
Miller *v.* United States 1103,1147,1228
Mills *v.* Singletary 1214
Mills *v.* United States 1112
Milton S. Katz & Associates; Vrba *v.* 1213
Mims, *In re* 1165
Mims *v.* United States 1246
Minetti *v.* Longshoremen 1170
Minnesota; Bowles *v.* 1163
Minnesota; Ford *v.* 1125
Minnesota; Pettee *v.* 1146
Minnesota; R. J. Reynolds Tobacco Co. *v.* 1222
Minnesota; Scott *v.* 1106
Misch *v.* Washington 1225
Misek-Falkoff *v.* International Business Machines Corp. 1111,1230
Misek-Falkoff *v.* Keller 1252
Mississippi; Alexander *v.* 1145
Mississippi; Bevill *v.* 1249
Mississippi; Boyd *v.* 1236
Mississippi; Davis *v.* 1192
Missouri Pacific R. Co. *v.* Shepherd 1235
Mitchell *v.* Bilby-Knight 1124
Mitchell *v.* California 1192
Mitrano, *In re* 1232
Mitrano *v.* Colonial Beach 1245
M. L. B. *v.* S. L. J. 1118,1185
Mock *v.* Pennsylvania Dept. of Environmental Resources 1216
Moises Luna and Associates; Gonzalez *v.* 1222
Molina *v.* United States 1249

Page
Moltan Co. *v.* Swaim 1244
Monreal *v.* United States 1174
Montana; Craig *v.* 1195
Montana *v.* Fort Belknap Indian Community 1129
Montana Dept. of Corrections and Human Services; Wolfe *v.* 1192
Montana Dept. of Transportation; Carter *v.* 1188
Montanez; Illinois *v.* 1251
Monterey County; Lopez *v.* 1118
Montgomery; Dayton Area Visually Impaired Persons, Inc. *v.* 1135
Montgomery County Dept. of Social Services; Harris *v.* 1132
Montgomery Ward Credit Corp.; Tucker *v.* 1248
Montoya *v.* Johnson 1133
Monzack; Mercer *v.* 1103
Moomchi *v.* University of N. M. 1224
Moon *v.* Thomas 1193
Moo & Oink, Inc.; Stancil *v.* 1238
Moore; Apache Corp. *v.* 1217
Moore; Cantrell *v.* 1248
Moore *v.* Dupree 1241
Moore *v.* Electrical Workers 1234
Moore; Gamble *v.* 1250
Moore; Kornahrens *v.* 1171
Moore; Lancour *v.* 1195
Moore *v.* United States 1228
Moore *v.* Virginia 1200
Moose Lodge #259 (Salt Lake City) *v.* Department of ABC 1221
Morales *v.* Industrial Comm'n of Ariz. 1233
Morata *v.* U. S. Postal Service 1151
Moretti *v.* Hackensack 1210
Morgan *v.* United States 1148,1207
Morgan Hill; Berger *v.* 1136
Morris *v.* Housing Authority of Kansas City 1236
Morris *v.* King 1193
Morris *v.* School Bd. of Norfolk 1108
Morrison *v.* Reno 1148
Morrison-Knudsen Co.; Gold *v.* 1213
Morris Products, Inc.; Arvin-Thornton *v.* 1151
Morrow *v.* Georgia 1171
Morrow *v.* Texas 1192
Morse *v.* Republican Party of Va. 186
Morton; Flemmings *v.* 1152
Morton; Green *v.* 1198
Morton; Square *v.* 1146
Mosier *v.* Kroger Co. 1220

	Page
Motley *v.* Marathon Oil Co.	1190
Moyer; Scott *v.*	1226
Mrozowski; Carter *v.*	1135
Mukherjee *v.* Sheraton-Palace Hotel	1237
Mulazim *v.* Nuckles	1193
Mullens *v.* United States	1112
Mullholand *v.* Harris Corp.	1172
Munoz *v.* United States	1126
Muraca, *In re*	1101
Murdock *v.* United States	1187
Murphy *v.* United States	1248
Murray; Coleman *v.*	1160
Murray; Construction Workers *v.*	1219
Murray *v.* Roach	1108
Murray *v.* United States	1113
Murtagh; Berks County *v.*	1104
Musser *v.* United States	1222
Myers; Catanio *v.*	1248
Myers; Ornelas *v.*	1151
Myles *v.* United States	1149
Nadal *v.* United States	1230
Nagle; Cotton *v.*	1236
Nagle; Grennier *v.*	1173
Nagle; Harvell *v.*	1225
Nakamoto *v.* United States	1122
Nakamura; Kobayashi *v.*	1210
Namba; Estes *v.*	1144,1230
Nance *v.* United States	1152
Nansay Haw., Inc. *v.* Public Access Shoreline Haw.	1163
Nash *v.* Lacombe	1171
Nasim *v.* Warden, Md. House of Correction	1163
Nassimos *v.* New Jersey Bd. of Examiners of Master Plumbers	1244
National Assn. of Broadcasters *v.* Miller	1155
National Assn. of Review Appraisers & Mortgage Underwriters, Inc. *v.* Appraisal Foundation	1189
National Assn., Reversionary Prop. Owners *v.* Surface Transp. Bd.	1106
National Basketball Assn.; Williams *v.*	1153
National Labor Relations Bd.; Auciello Iron Works, Inc. *v.*	781
National Labor Relations Bd.; Holly Farms Corp. *v.*	392
National Labor Relations Bd.; President Container, Inc. *v.*	1243
National Labor Relations Bd.; Teamsters *v.*	1133
National Mediation Bd.; Bravo *v.*	1104
National Railroad Passenger Corp. (AMTRAK); Lebron *v.*	1188
National Solid Wastes Management Assn.; Meyer *v.*	1119

Page
National Super Markets, Inc.; Bass *v.* 1208
NationsBanc Mortgage Corp.; Saleem *v.* 1107
Nava *v.* United States Soccer Federation 1225
Navajo County Bd. of Supervisors; Stanislaw *v.* 1236
Navarro *v.* Office of Personnel Management 1140
Nave *v.* Bowersox 1214
Neal *v.* Cooper 1197
Nebraska; Hansen *v.* 1249
Neely *v.* Rutherford County Schools 1134
Nehemiah Plan Homes Project; Elgendy *v.* 1106
Nelson; Barnett Bank of Marion County, N. A. *v.* 25
Nelson *v.* Cannon 1143
Nelson *v.* Hopkins 1146
Nelson *v.* Office of Personnel Management 1154
Nelson *v.* United States 1113,1229
Nelthropp; Ross *v.* 1236
Nernberg *v.* Ludmer 1220
Netherland *v.* Tuggle 1301
Netter *v.* United States 1130
Neufeld *v.* Baltimore 1222
Nevada; DeBarr *v.* 1192
Nevada; Hasa *v.* 1226
Nevada; McNelton *v.* 1212
Nevada; Riker *v.* 1194
Nevada Bd. of Medical Examiners; Bass *v.* 1234
Newberry; Anderson *v.* 1144
New Hampshire; Covillion *v.* 1204
New Hampshire; Grant-Chase *v.* 1140
New Hampshire; Rios *v.* 1160
New Hampshire Bd. of Licensure for Land Surveyors; Smith *v.* 1191
New Hampshire Motor Transport *v.* Plaistow 1120
New Haven; Hansen's Estate *v.* 1189
New Jersey; Ayars *v.* 1113,1227
New Jersey *v.* New York 1242
New Jersey; Thompson *v.* 1195
New Jersey Bd. of Examiners of Master Plumbers; Nassimos *v.* 1244
New Jersey Division of Youth and Family Services; Delbridge *v.* 1146
Newman *v.* Consolidation Coal Co. 1128
Newman *v.* Worcester County Dept. of Social Services 1136
New Mexico; Aguilar *v.* 1145
New Mexico; Hernandez *v.* 1128
New Mexico; Texas *v.* 1232
New Mexico Dept. of Human Services *v.* Joseph A. 1190
New Mexico Securities Division; Jenkins *v.* 1150

Page
News-Register Publishing Co.; McLeod *v.* 1116
Newton; Aguilar *v.* 1145,1230
Newton *v.* Board to Determine Fitness of Bar Applicants, Supreme Court of Ga. 1209
New York; Abdul Hakeem *v.* 1201
New York; Brito *v.* 1123
New York; Iadarola *v.* 1209
New York; Johnson *v.* 1172
New York; Kelley *v.* 1200
New York; Larrabee *v.* 1171
New York; New Jersey *v.* 1242
New York; Slade *v.* 1224
New York; Sussman *v.* 1173
New York City; Bal *v.* 1225
New York City; Department of Commerce *v.* 1
New York City; Oklahoma *v.* 1
New York City; Wisconsin *v.* 1
New York City Police Dept.; Liu *v.* 1167
New York Comm'n of Correction; Coleman *v.* 1160
New York State Workers' Compensation Bd.; White *v.* 1144
New York Telephone; Olenick *v.* 1195
Nguyen Huu To *v.* Rubin 1235
Nicholas *v.* Reno 1158
Nichols; Cotner *v.* 1123
Nicit *v.* Nicit 1120
Nighttime Concepts, Inc. *v.* Pennsylvania State Police, Bureau of Liquor Control Enforcement 1206
Nintendo of America, Inc.; Gussin *v.* 1166
Noble *v.* Columbia County Redevelopment Authority 1119
Nobles *v.* Office of Personnel Management 1138
Nobles *v.* Welborn 1171
Nock *v.* United States 1228
Nolan *v.* United States 1127
Noland; United States *v.* 535
Nooner *v.* Arkansas 1143
Nordvik *v.* Commissioner 1192
Norris *v.* Robinson 1115
Norris; Russell *v.* 1170
North Carolina; Boyd *v.* 1194
North Carolina; Burr *v.* 1123
North Carolina; Carter *v.* 1225
North Carolina; Frye *v.* 1123
North Carolina; Gregory *v.* 1108
North Carolina; Lynch *v.* 1143,1252

Page
North Carolina; McCarver *v.* 1110
North Carolina; Robinson *v.* 1197
North Carolina; Shrader *v.* 1191
North Carolina; Smith *v.* 1189
North Carolina; Sneeden *v.* 1161
North Carolina; Walls *v.* 1197
North Carolina Bd. of Elections; McLaughlin *v.* 1104
Norton; Kailey *v.* 1193
Norton; Ross *v.* 1111
Norton; Salazar *v.* 1110
Norwest Corp. *v.* Commissioner 1203
Notheis *v.* Petkovich 1160
Noxon, *In re* 1102
Nuckles; Mulazim *v.* 1193
Nunez *v.* Costello 1195
Nunez *v.* Johnson 1142
Nuss *v.* Office of Personnel Management 1205
Nuth; Smith *v.* 1196
NYNEX; Troni *v.* 1206
NYSA–ILA Medical and Clinical Services Fund; De Buono *v.* 1232
Oberg; Honda Motor Co. *v.* 1219
Occupational Safety and Health Administration; Mates *v.* 1105,1204
O'Connor *v.* Consolidated Coin Caterers Corp. 308
Oden *v.* Ohio 1193
Office of Personnel Management; Alcones *v.* 1140
Office of Personnel Management; Alferos *v.* 1139,1251
Office of Personnel Management; Alvarez *v.* 1226
Office of Personnel Management; Bernardez *v.* 1142
Office of Personnel Management; Bondad *v.* 1139,1252
Office of Personnel Management; Cabiles *v.* 1139
Office of Personnel Management; Calisaan *v.* 1139
Office of Personnel Management; Carpio *v.* 1139
Office of Personnel Management; Cayanan *v.* 1139
Office of Personnel Management; Coronel *v.* 1140,1252
Office of Personnel Management; Corpuz *v.* 1139
Office of Personnel Management; Cudal *v.* 1211
Office of Personnel Management; Custodio *v.* 1140
Office of Personnel Management; Daguinotnot *v.* 1138,1251
Office of Personnel Management; Danao *v.* 1139
Office of Personnel Management; De Guzman *v.* 1211
Office of Personnel Management; De Jesus *v.* 1138
Office of Personnel Management; Dela Rea *v.* 1140
Office of Personnel Management; Delos Reyes *v.* 1141
Office of Personnel Management; Dungca *v.* 1138

Page

Office of Personnel Management; Escusa *v.* 1142
Office of Personnel Management; Filamor *v.* 1138
Office of Personnel Management; Florentino *v.* 1139,1252
Office of Personnel Management; Foronda *v.* 1141,1252
Office of Personnel Management; Garcia *v.* 1141,1252
Office of Personnel Management; Ibalio *v.* 1138
Office of Personnel Management; Isla *v.* 1139
Office of Personnel Management; Magante *v.* 1140
Office of Personnel Management; Maglalang *v.* 1140
Office of Personnel Management; Mauricio *v.* 1138
Office of Personnel Management; Mayo *v.* 1140
Office of Personnel Management; Navarro *v.* 1140
Office of Personnel Management; Nelson *v.* 1154
Office of Personnel Management; Nobles *v.* 1138
Office of Personnel Management; Nuss *v.* 1205
Office of Personnel Management; Paje *v.* 1211
Office of Personnel Management; Palo *v.* 1140
Office of Personnel Management; Pantilon *v.* 1138
Office of Personnel Management; Quiba *v.* 1138,1251
Office of Personnel Management; Rabe *v.* 1139,1252
Office of Personnel Management; Reyes *v.* 1141
Office of Personnel Management; Sanchez *v.* 1141
Office of Personnel Management; Sandoval *v.* 1211
Office of Personnel Management; Santos *v.* 1141,1252
Office of Personnel Management; Siwa *v.* 1138
Office of Personnel Management; Tillo *v.* 1141
Office of Personnel Management; Young *v.* 1190
Office of Queens County District Attorney; Bernard *v.* 1143
O'Gilvie *v.* United States 1102
Ohio; Bies *v.* 1238
Ohio; Burke *v.* 1112
Ohio; Christopher *v.* 1247
Ohio; D'Ambrosio *v.* 1172
Ohio; Garner *v.* 1147,1230
Ohio; Gumm *v.* 1204
Ohio; Jackson *v.* 1214
Ohio; Kinley *v.* 1106
Ohio; Oden *v.* 1193
Ohio; Phillips *v.* 1213
Ohio; Richey *v.* 1119
Ohio *v.* Robinette 1154,1242
Ohio Adult Parole Authority; Winters *v.* 1123
Ohio Agricultural Commodity Depositors Fund *v.* Mahern 1130
Ohio Department of Development; Liggins *v.* 1148

	Page
Ohio Department of Rehabilitation and Correction; Popke *v.*	1224
Okayfor *v.* United States	1173
O'Kicki, *In re*	1117,1231
Oklahoma; Berget *v.*	1247
Oklahoma; Braun *v.*	1144
Oklahoma; Bryson *v.*	1144
Oklahoma; Colbert *v.*	1109
Oklahoma; Cooper *v.*	348
Oklahoma; Cotner *v.*	1193
Oklahoma; Current *v.*	1236
Oklahoma; Hai Cong Pham *v.*	1141
Oklahoma; Hatch *v.*	1235
Oklahoma; Hooks *v.*	1145
Oklahoma; Jones *v.*	1122
Oklahoma; Martinez *v.*	1209
Oklahoma; Miller *v.*	1213
Oklahoma *v.* New York City	1
Oklahoma *v.* Ponca Tribe of Okla.	1129
Oklahoma; Powell *v.*	1144
Oklahoma; Shabazz *v.*	1172,1196
Oklahoma City; Sawatzky *v.*	1156
Okolie *v.* Richardson	1161
Olds *v.* United States	1184
Oleka *v.* United States	1238
Olenick *v.* New York Telephone	1195
Oliver *v.* Texas	1110
Oliver *v.* Witkowski	1107
Ollie *v.* Kuhn	1238
Olsen *v.* Lane	1158,1252
Olsen *v.* Sabal Marketing, Inc.	1171
Oregon; Abbott *v.*	1214
Oregon; Rise *v.*	1160
Oregon Lithoprint, Inc.; McLeod *v.*	1116
Oregon Public Utility Comm'n *v.* GTE Northwest Inc.	1155
Oregon State Bar; Altstatt *v.*	1129
Oregon State Bar; Kowalski *v.*	1108,1230
Oregon State Prison; Miller *v.*	1161
Orlando; Hardy *v.*	1139,1252
Ornelas *v.* Myers	1151
Ornelas *v.* United States	690
Ortiz *v.* Department of Health and Human Services	1136
Osborne *v.* First Federal Savings Bank	1237
Osherow; Cluck *v.*	1142
Owens *v.* Texas	1140

Page
Owens *v.* United States 1112
Owensboro National Bank; Stephens *v.* 1119
Owens-Corning Fiberglas Corp. *v.* Brennan 1243
Owens-Corning Fiberglas Corp. *v.* Dudley 1244
Owens-Corning Fiberglas Corp. *v.* Pickering 1243
Owens-Corning Fiberglas Corp. *v.* Rekdahl 1243
Owner-Operator Independent Drivers Assn., Inc.; Eagerton *v.* .. 1121
Oxford *v.* Bowersox 1124,1252
OXY USA Inc. *v.* Continental Trend Resources, Inc. 1216
Oyler *v.* United States 1246
P. *v.* Carlisle Area School Dist. 1135
Pace; Tedder *v.* 1195
Pacheco-Rodriguez *v.* United States 1113
Pacific Merchant Shipping Assn.; Veneman *v.* 1221
Padgett *v.* United States 1238
Padilla *v.* United States 1174
Padovano; Pearson *v.* 1237
Pagan-San-Miguel *v.* United States 1234
Page; Dedes *v.* 1237
Page *v.* Texas Bd. of Pardons and Parole 1123,1240
Paje *v.* Office of Personnel Management 1211
Palacios *v.* United States 1198
Palmer Communications, Inc. *v.* Total TV 1102,1152
Palmisano *v.* Bilandic 1223
Palmisano *v.* Exec. Comm., U. S. Dist. Ct., N. Dist. of Ill. 1223
Palo *v.* Office of Personnel Management 1140
Pandey *v.* Paul Revere Life Ins. Co. 1132,1251
Pantilon *v.* Office of Personnel Management 1138
Parke; Smith *v.* 1253
Parkhurst *v.* Shillinger 1238
Parks *v.* Allstate Ins. Co. 1159
Parsons; Shabazz *v.* 1213
Paskvan; Brown *v.* 1156
Paster *v.* Tensas Basin Levee Dist. 1195
Pataki; McReynolds *v.* 1159
Patent and Trademark Office; Schwarz *v.* 1215
Pathology Laboratories of Ark.; Central States, S. E. & S. W. Areas Health and Welfare Fund *v.* 1233
Patin *v.* California 1124
Patrick *v.* Texas 1106
Patterson *v.* California 1124
Paul Revere Life Ins. Co.; Pandey *v.* 1132,1251
Pawtucket; Dyson *v.* 1192
Pearson *v.* Padovano 1237

Page
Pearson *v.* United States 1113
Pedraza *v.* United States 1162
Peeples *v.* United States 1217
Peloquin *v.* United of Omaha Life Ins. Co. 1120
Pennsylvania; Bracey *v.* 1122
Pennsylvania; Crawley *v.* 1212
Pennsylvania; Davis *v.* 1173
Pennsylvania; Fried *v.* 1191
Pennsylvania; Graham *v.* 1157
Pennsylvania; Hill *v.* 1235
Pennsylvania; Lee *v.* 1211
Pennsylvania; Smith *v.* 1141,1252
Pennsylvania; Wharton *v.* 1247
Pennsylvania Dept. of Corrections; Barbee *v.* 1226
Pennsylvania Dept. of Environmental Resources; Mock *v.* 1216
Pennsylvania Municipal Service Co.; Green *v.* 1222
Pennsylvania State Police, Bureau of Liquor Control Enforcement; Hospitality Investments of Philadelphia, Inc. *v.* 1206
Pennsylvania State Police, Bureau of Liquor Control Enforcement; Nighttime Concepts, Inc. *v.* 1206
Penson; Kelly *v.* 1210
Pepper *v.* Damer 1245
Perego *v.* King Instrument Corp. 1188
Perry *v.* Lewter 1136
Petereit *v.* S. B. Thomas, Inc. 1119
Petersen *v.* Government of Virgin Islands 1231
Petitte Brothers Mining Co. *v.* Connors 1189
Petkovich; Notheis *v.* 1160
Pettee *v.* Minnesota 1146
Pham *v.* Oklahoma 1141
Philadelphia Park; Robert *v.* 1222
Philip Morris Inc. *v.* Commissioner 1220
Philip Morris Products, Inc.; Arvin-Thornton *v.* 1151
Phillips; McElrath *v.* 1165
Phillips *v.* Ohio 1213
Phillips *v.* United States 1149
Pic-A-State PA, Inc. *v.* Reno 1246
Pickering; Owens-Corning Fiberglas Corp. *v.* 1243
Pickering *v.* Unisys Corp. 1103
Pickering; Unisys Corp. *v.* 1103
Pickle *v.* Dutton 1196
Pierce *v.* Iowa-Missouri Conference of Seventh-day Adventists 1220
Pillsbury Co. *v.* Port of Corpus Christi Authority 1203
Piloto *v.* United States 1146

	Page
Pincham, *In re*	1153
Pine; D'Amario *v.*	1198
Pinkerton Security Services; Hardy *v.*	1161
Piper, *In re*	1165
Pitsch *v.* Michigan Attorney Grievance Comm'n	1172
Pittman *v.* Chicago Bd. of Ed.	1243
Pittsburgh Police Dept.; Smith *v.*	1213
Pittston Co. *v.* Babbitt	1134
Plaistow; New Hampshire Motor Transport *v.*	1120
Planned Parenthood, Sioux Falls Clinic; Janklow *v.*	1174
Plantier; Emery *v.*	1197
Platzer *v.* Barbour	1109
Plenert; Bennett *v.*	1102
Plott *v.* General Motors Corp.	1157
Plunk *v.* United States	1188
Plywood Panels, Inc.; Brown *v.*	1168
Poarch Band of Creek Indians *v.* Alabama	1133
Poarch Band of Creek Indians; Alabama *v.*	1133
Pollack, *In re*	1153
Polley *v.* Georgia State Bd. of Pardons and Paroles	1107
Polur *v.* Grievance Committee for Southern Dist. of N. Y.	1196
Ponca Tribe of Okla.; Oklahoma *v.*	1129
Ponder *v.* United States	1193
Pope *v.* Hunt	899
Pope *v.* United States	1211
Popke *v.* Ohio Department of Rehabilitation and Correction	1224
Porter *v.* Arkansas	1108
Port of Corpus Christi Authority; Pillsbury Co. *v.*	1203
Posner *v.* Central Synagogue	1119
Postmaster General; Carter *v.*	1106
Postmaster General; Smith *v.*	1188
Pourzandvakil *v.* Humphrey	1204
Powell *v.* Oklahoma	1144
Powell *v.* United States	1111
Powers *v.* Rockefeller	1203
Powers; Rockefeller *v.*	1203
Pozsgay *v.* Pozsgay	1242
Pratt *v.* United States	1174
Praxair, Inc. *v.* Florida Power & Light Co.	1190
President Container, Inc. *v.* National Labor Relations Bd.	1243
President of U. S.; Califorrniaa *v.*	1204
Pressley *v.* Commissioner	1223
Price *v.* Bossier Parish School Bd.	1232
Price *v.* McDade	1197

	Page
Price *v.* United States	1239
Price Co. *v.* Fecht	1136
Price-El *v.* Gee	1107
Prieto *v.* Crawford	1223
Prince George's County; Thomason *v.*	1189
Pringle *v.* Gillis	1227
Pringle *v.* United States	1152
Priore *v.* United States	1127
Privett *v.* United States	1226
Pro-Choice Network of Western N. Y.; Schenck *v.*	1242
Procter & Gamble Co.; Bankers Trust Co. *v.*	1205
Production Plated Plastics, Inc. *v.* United States	1133
Pruitt *v.* Howard County Sheriff's Dept.	1235
Pryce *v.* United States	1193
Public Access Shoreline Haw.; Nansay Haw., Inc. *v.*	1163
Public Utilities Comm'n of Cal.; Aaron *v.*	1185
Pudlo *v.* Illinois	1137
Pulido *v.* United States	1235
Purefoy *v.* United States	1250
Purkett; Miller *v.*	1136
Purkett; Woods *v.*	1110
Purnell; Smart *v.*	1236
Quackenbush *v.* Allstate Ins. Co.	706
Quantum Chemical Corp.; Lehtinen *v.*	1244
Quantum Corp.; Rodime PLC *v.*	1167
Queens College of City Univ. of N. Y.; Soffer *v.*	1245
Quiba *v.* Office of Personnel Management	1138,1251
Rabe *v.* Office of Personnel Management	1139,1252
Rader; Melancon *v.*	1194
Radic *v.* Chicago Transit Authority	1247
Ragan *v.* ContiCommodity Services, Inc.	1104
Ram *v.* De Galan	1115
Rambo; Daley *v.*	1157
Ramer *v.* Johnson	1170
Ramer *v.* Thomas	1145
Ramey *v.* Ashland Oil, Inc.	1109,1205
Ramos *v.* Bunnell	1171
Ramos *v.* United States	1191
Randall, *In re*	1207
Raney *v.* United States	1105
Rangel-Ibarra *v.* United States	1199
Rashi *v.* Conley	1193
Ratliff *v.* United States	1243
Rauser *v.* Beard	1145

Page
Ray; Dolcefino *v.* 1121
Rayfield; Florida *v.* 1136
Ready, *In re* 1131
Red Lake Band of Chippewa Indians *v.* United States 1208
Reed; Johnson *v.* 1150
Reed *v.* United States 1246
Reese *v.* United States 1228
Reeves, *In re* 1186,1207
Regency; Janneh *v.* 1224
Reich; Skepton *v.* 1166
Reich; Wright *v.* 1237
Reilly, *In re* 1218
Rekdahl; Owens-Corning Fiberglas Corp. *v.* 1243
Reliford *v.* Hodges 1112
Reliford *v.* Scott 1125
Reliford *v.* United States 1125
Renelus *v.* United States 1174
Reno; Blackston *v.* 1204
Reno *v.* Bossier Parish School Bd. 1154,1232
Reno; Morrison *v.* 1148
Reno; Nicholas *v.* 1158
Reno; Pic-A-State PA, Inc. *v.* 1246
Repsis; Crow Tribe of Indians *v.* 1221
Republican Party of Va.; Morse *v.* 186
Resorts International, Inc.; Lowenschuss *v.* 1243
Revere Life Ins. Co.; Pandey *v.* 1251
Reyes *v.* Lugo 1119
Reyes *v.* Office of Personnel Management 1141
Reynolds *v.* Vermont 1237
Reynolds Tobacco Co. *v.* Minnesota 1222
Rhode Island; 44 Liquormart, Inc. *v.* 484
Rhode Island; Gallipeau *v.* 1199
Rhode Island; Jacques *v.* 1212
Rhodes *v.* United States 1164
Richards *v.* Jefferson County 793
Richardson *v.* Citibank (S. D.), N. A. 1244
Richardson; Okolie *v.* 1161
Richardson; Smith *v.* 1205
Richey *v.* Ohio 1119
Richey *v.* United States 1113
Rickles; Bishop *v.* 1247
Riggins *v.* Kasenow 1225
Riggio *v.* United States 1126
Riker *v.* Nevada 1194

	Page
Rios *v.* Los Angeles County Dept. of Children and Family Servs.	1234
Rios *v.* New Hampshire	1160
Rise *v.* Oregon	1160
Rivens *v.* Dunn	1159
Rivera *v.* United States	1250
Rivera Mining Co.; Simpson *v.*	1109,1163
Riverdale Plating & Heat Treating Co.; Garcia *v.*	1237
Rivers *v.* United States	1250
R. J. Reynolds Tobacco Co. *v.* Minnesota	1222
Roach; Hines *v.*	1108
Roach; Mattison *v.*	1225
Roach; Murray *v.*	1108
Roadway Express, Inc.; Dushaw *v.*	1120
Roane; Crawford *v.*	1121
Roberson *v.* Suarez Corp.	1195
Robert *v.* Philadelphia Park	1222
Roberts *v.* Chater	1122
Roberts *v.* Hanks	1194
Roberts; Hentz *v.*	1225
Robertson; Alsberg *v.*	1168
Robertson; Alsberg Brothers Boatworks *v.*	1168
Robertson *v.* United States	1162
Robillard *v.* Baton Rouge Marine Contractors, Inc.	1135
Robinette; Ohio *v.*	1154,1242
Robinson, *In re*	1152,1230
Robinson; Edmond *v.*	1201
Robinson *v.* Meloy	1158,1230
Robinson; Norris *v.*	1115
Robinson *v.* North Carolina	1197
Robinson *v.* Shell Oil Co.	1154
Robinson *v.* United States	1149,1158,1220
Rockefeller *v.* Powers	1203
Rockefeller; Powers *v.*	1203
Rodenbaugh *v.* Leary	1223
Rodime PLC *v.* Quantum Corp.	1167
Rodriguez; Caliendo *v.*	1231
Rodriguez *v.* Florida	1123,1205
Rodriguez *v.* United States	1112,1174
Rodriguez *v.* Wolf	1204
Rodriguez de Castro *v.* United States	1155
Rodriguez-Solel Botello *v.* United States	1112
Rogers *v.* Desiderio	1164
Rogers *v.* Johnson	1235
Rogers *v.* United States	1239

Page
Roggy *v.* United States 1200
Romer *v.* Evans 620
Romero *v.* United States 1149
Rosario *v.* United States 1223
Rose *v.* United States 1174
Roselin *v.* Board of Patent Appeals and Interferences 1116
Rosen *v.* Iowa Bd. of Medical Examiners 1104
Rosenberg *v.* Wachtler 1120
Ross *v.* Nelthropp 1236
Ross *v.* Norton 1111
Ross *v.* United States 1200
Rourke *v.* United States 1215
Roussos *v.* Allstate Ins. Co. 1107
Roussos *v.* Baxley 1225
Roussos *v.* Felter 1225
Roy, *In re* 1132,1230
R. S. L. Layout & Design, Inc.; Smith *v.* 1136
Rubin; Nguyen Huu To *v.* 1235
Ruiz-Mendoza *v.* United States 1106
Runyon; Carter *v.* 1106
Runyon; Smith *v.* 1188
Russell *v.* Federal Deposit Ins. Corp. 1166
Russell *v.* Norris 1170
Ruth *v.* United States 1158
Rutherford County Schools; Neely *v.* 1134
Rutledge *v.* United States 292
Ruvalcaba *v.* Los Angeles 1216
Rye Psychiatric Hospital Center, Inc. *v.* Surles 1233
Saathoff *v.* Hesse 1123
Sabal Marketing, Inc.; Olsen *v.* 1171
Saccoccia *v.* United States 1105
St. Agnes Medical Center; Menna's Estate *v.* 1165
St. Augustine Manor; Cully *v.* 1188
St. Clair *v.* United States 1112
St. Johns County; Cafe 207, Inc. *v.* 1156
St. Ledger *v.* Kentucky Revenue Cabinet 1206
St. Louis County *v.* Kornblum 1189
St. Paul Mercury Ins. Co. *v.* B & D Mechanical Contractors, Inc. 1167
St. Peter Villa, Inc. *v.* Linton 1155
Salazar *v.* Arizona 1123
Salazar *v.* Norton 1110
Saldamarco *v.* United States 1238
Saleem *v.* NationsBanc Mortgage Corp. 1107
Sales *v.* Sparks 1107

Page
Salzer *v.* Dellinger 1122
Sampley; Indiana Dept. of Correction *v.* 1220
San Antonio Independent School Dist.; DeLeon *v.* 1108
Sanborn *v.* Kentucky 1223
Sanchez *v.* Office of Personnel Management 1141
Sanchez *v.* United States 1173,1214,1246
Sanders *v.* Louisiana 1246
Sanders *v.* United States 1147,1148,1238
San Diego County; Banks *v.* 1123
San Diego County; Klat *v.* 1130
Sandoval *v.* Office of Personnel Management 1211
San Francisco; Ziomek *v.* 1137
San Francisco Bay Area Rapid Transit Dist.; Gilbert *v.* 1108
San Mateo County Youth and Family Services Division; Hill *v.* 1170
Santa Ana Unified School Dist.; Class of Gutierrez *v.* 1168
Santa Clara County; Jensen *v.* 1157
Santana-Castellano *v.* United States 1228
Santiago *v.* Snyder 1238
Santos *v.* Office of Personnel Management 1141,1252
Saraco *v.* United States 1166
Sarasota County; Bass *v.* 1246
Sartin *v.* Virginia 1125,1216
Saulsberry *v.* United States 1200
Saunders *v.* American Telephone & Telegraph Co. 1150
Saunders; Graves *v.* 1249
Saunders *v.* United States 1125
Savage; Madden *v.* 1213
Savell; Voigt *v.* 1209
Sawatzky *v.* Oklahoma City 1156
S. B. Thomas, Inc.; Petereit *v.* 1119
Schake *v.* United States 1114
Schenck *v.* Pro-Choice Network of Western N. Y. 1242
Schmoke; Anheuser-Busch, Inc. *v.* 1206
School Bd. of Norfolk; Morris *v.* 1108
Schotten; Billups *v.* 1142
Schouman, *In re* 1165
Schriro; Harvey *v.* 1146
Schroubroek; Hill *v.* 1109
Schulte *v.* Smith 1220
Schumer; Hughes Aircraft Co. *v.* 1218
Schusterman *v.* United States 1208
Schutterle *v.* United States 1210
Schwartz *v.* Aultman Health Services Assn. 1132
Schwartz *v.* Aultman Hospital 1132

Page
Schwarz *v.* Patent and Trademark Office 1215
Schwarz *v.* United States Fidelity & Guaranty Co. 1226
Schwarzchild; Tse *v.* 1121
Scott *v.* California 1144
Scott *v.* Minnesota 1106
Scott *v.* Moyer 1226
Scott; Reliford *v.* 1125
Scott *v.* United States 1114,1127
Scott; United States *v.* 1232
Scott *v.* U. S. District Court 1171
Scott P. *v.* Carlisle Area School Dist. 1135
Seaman, *In re* 1117,1231
SeaRiver Maritime, Inc. *v.* Exxon Seamen's Union 1251
Sears *v.* United States 1111
Sears, Roebuck & Co.; Hanus *v.* 1194
Sears, Roebuck & Co.; Woodbury *v.* 1160
Secakuku *v.* Hale 1168
Secretary of Agriculture; Clifford *v.* 1132
Secretary of Agriculture *v.* Wileman Brothers & Elliott, Inc. . . . 1232
Secretary of Agriculture; Wileman Brothers & Elliott, Inc. *v.* . . . 1233
Secretary of Army; Watkis *v.* 1204
Secretary of Commerce; Environmental Coalition of Ojai *v.* 1245
Secretary of HUD; Cost Control Marketing & Sales Mgmt. of Va. *v.* 1187
Secretary of Interior; Alaska *v.* 1187
Secretary of Interior; Fort Sumter Tours, Inc. *v.* 1220
Secretary of Interior; Pittston Co. *v.* 1134
Secretary of Interior *v.* Youpee 1232
Secretary of Labor; Skepton *v.* 1166
Secretary of Labor; Wright *v.* 1237
Secretary of Navy; Brazil *v.* 1103
Secretary of Treasury; Nguyen Huu To *v.* 1235
Secretary of Veterans Affairs; Aronson *v.* 1209
Secretary of Veterans Affairs; Guzman Zayas *v.* 1124,1205
Secretary of Veterans Affairs; Jardine *v.* 1185
Secretary of Veterans Affairs; LeFevre *v.* 1188
Secretary of Veterans Affairs; Sudranski *v.* 1110,1205
Securities and Exchange Comm'n; Blount *v.* 1119
Sedano *v.* Illinois 1172
Sedwick; Curiale *v.* 1152
Seehan *v.* Iowa 1173
Seeley; Alabama *v.* 1187
Seikel, *In re* 1117,1231
Sellers *v.* Boyd 1111
Seminole Tribe of Fla. *v.* Florida 44

	Page
Seminole Tribe of Fla.; Florida *v.*	1133
Sessions; Bogan *v.*	1170
Sever *v.* Bell Communications Research	1223
Sever *v.* Bellcore	1223
Sever *v.* United States	1211
Sevigny *v.* Maine	1107,1158
Sewell *v.* Illinois	1145
Shabazz *v.* Oklahoma	1172,1196
Shabazz *v.* Parsons	1213
Shabazz *v.* Unknown Heads of Clandestine Secret Bodies of Lexington Correc. Ctr. Mail Room & Lit. Rev. Comm. Members	1236
Shade; Fabian *v.*	1212
Shaffer *v.* United States	1215
Shafii *v.* British Airways	1161
Shak *v.* Tanaka	1166
Sharif *v.* Welborn	1171
Sharma; Anderson *v.*	1234
Sharon; Tarabolski *v.*	1142
Sharp *v.* Cawley	1124
Shavers *v.* United States	1227
Shaw *v.* Hunt	899
Shaw *v.* United States	1211
Shay; Borawick *v.*	1229
Shearson Lehman Brothers, Inc. *v.* Hughes, Hubbard & Reed	1245
Shelby County Information Technology; Willis *v.*	1104
Shelley School Dist.; Geery *v.*	1237
Shell Oil Co.; Robinson *v.*	1154
Shelstad *v.* West One Bank (Idaho)	1156
Shelton *v.* United States	1125,1239
Shepherd; Missouri Pacific R. Co. *v.*	1235
Sheppard *v.* Virginia	1110
Sheraton-Palace Hotel; Mukherjee *v.*	1237
Sheriff, Fulton County; Singer *v.*	1189
Sherman; Citibank (S. D.), N. A. *v.*	1241
Sherman *v.* Johnson	1205
Sherrow *v.* United States	1114
Sherry *v.* United States	1149
Sherwin-Williams; Central States, S. E. & S. W. Areas Pens. Fd. *v.*	1190
Shieh *v.* Ebershoff	1132,1218
Shieh *v.* Hathaway	1132,1218
Shieh *v.* Kakita	343,1186
Shieh *v.* Krieger	343,1186
Shieh *v.* U. S. Court of Appeals	343,1186
Shillinger; Parkhurst *v.*	1238

Page
Shipman; Barcher *v.* 1235
Shoffeitt *v.* United States 1246
Shorb *v.* United States 1112
Shores *v.* Foster 1158
Shrader *v.* North Carolina 1191
Siemens Power Corp.; Lindenmeier *v.* 1221
Sikora *v.* Doe 1163
Silks *v.* United States 1199
Silva *v.* Madison 1121
Silverburg *v.* Ashley 1122
Simmons; Mangrum *v.* 1159
Simmons *v.* United States 1173,1199
Simon *v.* United States 1138
Simone *v.* Worcester County Institution for Savings 1151
Simpson *v.* Childers 1212
Simpson *v.* Cristino Rivera Mining Co. 1109,1163
Sims *v.* Illinois 1172
Singer *v.* Sheriff, Fulton County 1189
Singletary; Crabtree *v.* 1161,1240
Singletary; Dunn *v.* 1110
Singletary; Koffiel *v.* 1160
Singletary; Medina *v.* 1247
Singletary; Mills *v.* 1214
Singletary; Smiddy *v.* 1107,1205
Singletary; Stano *v.* 1151
Singleton; Bolt *v.* 1151
Sinis *v.* United States 1126
Siqueros *v.* California 1159
Sisk, *In re* 1219
Siwa *v.* Office of Personnel Management 1138
640 Broadway Renaissance Co. *v.* Eisner 1155
Skepton *v.* Reich 1166
Skupniewitz; Mack *v.* 1124
Slade *v.* New York 1224
Slaton *v.* Miller 1214
Sledge *v.* Cummings 1145
S. L. J.; M. L. B. *v.* 1118,1185
Small *v.* United States 1229
Small Business Administration; Eames *v.* 1210
Smart *v.* Purnell 1236
Smiddy *v.* Singletary 1107,1205
Smiley *v.* Citibank (S. D.), N. A. 735,1118,1154
Smith; Broida *v.* 1151
Smith *v.* Glenolden Borough 1167,1251

Page
Smith *v.* Hargett 1122
Smith *v.* Herring 1159
Smith *v.* Kuhlmann 1216
Smith *v.* McBride 1170
Smith *v.* New Hampshire Bd. of Licensure for Land Surveyors 1191
Smith *v.* North Carolina 1189
Smith *v.* Nuth 1196
Smith *v.* Parke 1253
Smith *v.* Pennsylvania 1141,1252
Smith *v.* Pittsburgh Police Dept. 1213
Smith *v.* Richardson 1205
Smith *v.* R. S. L. Layout & Design, Inc. 1136
Smith *v.* Runyon 1188
Smith; Schulte *v.* 1220
Smith *v.* United States 1101,1112,1122,1148,1191,1199,1249,1250
Smith; Wallace *v.* 1205
Smith & Nephew Dyonics, Inc. *v.* Violette 1167
Smithtown; SSC Corp. *v.* 1150
Sneeden *v.* North Carolina 1161
Snurkowski *v.* Angelone 1238
Snyder; Claudio *v.* 1109
Snyder; Santiago *v.* 1238
Soares *v.* United States 1191
Sobin *v.* Florida 1109
Sofec, Inc.; Exxon Co., U. S. A. *v.* 830
Soffer *v.* Queens College of City Univ. of N. Y. 1245
Sokolow, *In re* 1101
Soler-Somahano *v.* Immigration and Naturalization Service 1144
Solventes y Quimica de Nicaragua, S. A. Solquimisa *v.* Weaver 1156
South Carolina; Holmes *v.* 1248
South Carolina Electric & Gas Co.; Griggs *v.* 1156
Southeastern Pa. Transportation Authority; Dykes *v.* 1142
Southwest Media Corp.; Dolenz *v.* 1134,1240
Spagnoulo *v.* United States 1116
Sparks; Dwyer *v.* 1194
Sparks; Sales *v.* 1107
Sparky's Waterfront Saloon, Inc. *v.* Cosmopolitan, Inc. 1189
Spears; Hayes *v.* 1170
Spears *v.* State Bar of Ill. 1105
Spellman, *In re* 1219
Spencer *v.* Spencer 1222
Sperau; Ford Motor Co. *v.* 1217
Spink; Lockheed Corp. *v.* 882,1118
Spokane Tribe of Indians; Washington *v.* 1129

	Page
Sprankle *v.* Sprankle	1195
Spriggs *v.* United States	1112
Springer *v.* Bend	1209
Spychala *v.* Lewis	1223
Square *v.* Morton	1146
SSC Corp. *v.* Smithtown	1150
Stainer; Contreras *v.*	1143
Stancil *v.* Moo & Oink, Inc.	1238
Standing Bear *v.* United States	1147
Stanislaw *v.* Navajo County Bd. of Supervisors	1236
Stanley, *In re*	1206
Stanley *v.* California	1208
Stano *v.* Singletary	1151
Starbuck; Hernandez *v.*	1223
Starks *v.* United States	1113
State. See also name of State.	
State Bar of Cal.; James *v.*	1143
State Bar of Ill.; Spears *v.*	1105
State Bar of Tex.; Levario *v.*	1218
State Farm Automobile Ins. Co.; Barbee *v.*	1160
State Farm Fire & Casualty Co.; Bolt *v.*	1120
State Farm Fire & Casualty Ins. Co.; Wilson *v.*	1135
State Farm Ins. Co.; Bynum *v.*	1161
Stearns-Miller *v.* Ault	1225
Stearns-Miller *v.* Brown	1225
Stedman *v.* United States	1250
Steeves *v.* Allen	1146
Steeves *v.* Benson	1171
Steinberg *v.* Bingham	1134,1240
Steinberg *v.* Steinberg	1173
Stepard *v.* United States	1105
Stephen *v.* Hewitt	1193
Stephens *v.* Cain	1143,1205
Stephens *v.* Owensboro National Bank	1119
Stern *v.* United States	1187
Steve Knight Steel Fabricators *v.* U. S. Fidelity & Guaranty Ins.	1134
Stevens *v.* Lincoln	1196
Stevens *v.* United States	1113
Stine *v.* United States	1169
Stitt *v.* Johnson	1212
Stone; Stramel *v.*	1168
Stoorman *v.* Greenwood Trust Co.	1244
Stork Brabant B. V. *v.* D'Almeida	1168
Stramel *v.* Stone	1168

Page
Strickland *v.* Crowe 1223
Strowski *v.* Bank of America 1106,1204
Struck *v.* Kennebec County 1168
Strydom *v.* United States 1149
Stuart; Idaho *v.* 1234
Suarez Corp.; Roberson *v.* 1195
Sudranski *v.* Brown 1110,1205
Suggs *v.* United States 1148
Sultan *v.* California 1141
Summers, *In re* 1165
Sumpter *v.* United States 1187
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court of Cal., San Luis Obispo County; Dale *v.* 1224
Superior Court of Cal., Santa Clara County; Hanlin *v.* 1121
Supreme Court of Cal.; Hurst *v.* 1171
Surface Transp. Bd.; National Assn., Reversionary Prop. Owners *v.* 1106
Surles; Rye Psychiatric Hospital Center, Inc. *v.* 1233
Sussman *v.* New York 1173
Suter; Jeffress *v.* 1194
Sutton *v.* Gibson 1191
Swaim; Gurley *v.* 1244
Swaim; Moltan Co. *v.* 1244
Swano, *In re* 1165
Swartz *v.* Iowa 1172
Sweat *v.* United States 1249
Sweeney; Apa *v.* 1229
Sweeney *v.* United States 1151
Swendra *v.* Woodford 1196
Sykes *v.* United States 1246
Sylvania Shoe Mfg. Corp.; Knapp Shoes Inc. *v.* 1245
Tafoya *v.* Zavaras 1195
Talbott *v.* C. R. Bard, Inc. 1230
Talley *v.* Flathead Valley Community College 1121,1216
Tam *v.* Continental Ins. 1167
Tamakloe *v.* United States 1127,1205
Tamburello *v.* Comm-Tract Corp. 1222
Tanaka; Shak *v.* 1166
Tanner, *In re* 1184
Tarabolski *v.* Sharon 1142
Target Sportswear, Inc. *v.* United States 1208
Tate *v.* James 1108
Tate *v.* United States 1192
Tatum *v.* Columbia Natural Resources, Inc. 1163

Page
Tax Comm'r of Ohio; General Motors Corp. *v.* 1118
Taylor, *In re* 1242
Taylor *v.* Cain 1236
Taylor *v.* Cobb 1160
Taylor *v.* Hanks 1194
Taylor *v.* Illinois 1140
Taylor; Isaac *v.* 1238
Taylor *v.* United States 1149,1222
Taylor; White *v.* 1103
Teague *v.* United States 1158
Teamsters *v.* National Labor Relations Bd. 1133
Tedder *v.* Johnson 1194
Tedder *v.* Pace 1195
Tennessee; House *v.* 1193
Tennessee; Miller *v.* 1146
Tensas Basin Levee Dist.; Paster *v.* 1195
Territory. See name of Territory.
Terry *v.* Huffman 1143
Terry *v.* United States 1158
Texas; Baptiste *v.* 1125
Texas; Bennett *v.* 1109,1205
Texas; Campbell *v.* 1140,1209
Texas; Casares *v.* 1124
Texas; Fuller *v.* 1248
Texas; McFarland *v.* 1169
Texas; Morrow *v.* 1192
Texas *v.* New Mexico 1232
Texas; Oliver *v.* 1110
Texas; Owens *v.* 1140
Texas; Patrick *v.* 1106
Texas Bd. of Pardons and Parole; Page *v.* 1123,1240
Tharp *v.* Iowa Dept. of Corrections 1135
Tharpe *v.* United States 1146
Tho Dinh Tran *v.* Dinh Truong Tran 1133
Tho Dinh Tran; Dinh Truong Tran *v.* 1134
Thomas; Echols *v.* 1116
Thomas *v.* Evans 1196
Thomas; Felker *v.* 1151
Thomas; Litz *v.* 1135,1240
Thomas; Lonchar *v.* 314
Thomas; Moon *v.* 1193
Thomas; Ramer *v.* 1145
Thomas *v.* United States 1128,1162,1191,1229,1240
Thomas, Inc.; Petereit *v.* 1119

Page
Thomason *v.* Prince George's County 1189
Thompson; Bartley *v.* 1210
Thompson; Davis *v.* 1237
Thompson; Fields *v.* 1198
Thompson; Lucas *v.* 1247
Thompson; McBride *v.* 1108
Thompson; McCormack *v.* 1173
Thompson *v.* New Jersey 1195
Thompson; Windelberg *v.* 1196
Thomson *v.* Harmony 1105
Thornbrugh *v.* Brett 1213
Tighe, *In re* 1185
Tilli *v.* Van Antwerpen 1227
Tillo *v.* Office of Personnel Management 1141
Tinsley, *In re* 1101
Tinsley *v.* Methodist Hospital of Ind. 1146
To *v.* Rubin 1235
Tobisch *v.* United States 1161
Tokhtameshev *v.* American National Can Co. 1151
Toledo *v.* United States 1114
Tootle *v.* United States 1123
Total TV; Palmer Communications, Inc. *v.* 1102,1152
Totemoff *v.* Alaska 1244
Tow-Motor Forklift Co.; Batts *v.* 1221
Town. See name of town.
Townzen *v.* El Dorado County 1122
Tracey; General Motors Corp. *v.* 1118
Tracy *v.* Chief of National Guard Bureau 1214
Trahan *v.* Trahan 1155,1251
Tran *v.* Dinh Truong Tran 1133
Tran; Dinh Truong Tran *v.* 1134
Tran *v.* Tho Dinh Tran 1134
Tran; Tho Dinh Tran *v.* 1133
Treadway *v.* California 1212
Trentz, *In re* 1102
Triestman *v.* United States 1157
Trippet *v.* California 1197
Trippett; Kissane *v.* 1199
Trivedi *v.* Department of Defense 1110
Troni, *In re* 1206
Troni *v.* NYNEX 1206
Truck Ins. Exchange; Melkonian *v.* 1151
Trueblood *v.* United States 1127
Truesdale *v.* United States 1215

Page
Trujillo *v.* Illinois 1121
Truong Tran *v.* Tho Dinh Tran 1134
Truong Tran; Tho Dinh Tran *v.* 1133
Tse *v.* Schwarzschild 1121
Tubridy; Fort Peck Assiniboine and Sioux Tribes *v.* 1104
Tucker, *In re* 1207
Tucker *v.* Montgomery Ward Credit Corp. 1248
Tuggle; Netherland *v.* 1301
Turnbo; Coupar *v.* 1126
Turner; McQueen *v.* 1224
Turner; Ward *v.* 1152
Turner Broadcasting System, Inc. *v.* FCC 1218
Turpin; Felker *v.* 1182,1218
Turpin; Graham *v.* 1171
Turpin *v.* United States 1106
25th Judicial Dist. Probation Dept.; Green *v.* 1240
Twin Cities Area New Party; McKenna *v.* 1219
Tyler *v.* Bowersox 1152
Underwood *v.* United States 1126
Union. For labor union, see name of trade.
Union Security Life Ins. Co. *v.* Crocker 1230
Unisys Corp. *v.* Pickering 1103
Unisys Corp.; Pickering *v.* 1103
Unitarian-Universalist Society of Sacramento, Inc.; Burress *v.* 1169
United Airlines, Inc.; Ellis *v.* 1245
United of Omaha Life Ins. Co.; Peloquin *v.* 1120
United Pentecostal Church International; Green *v.* 1134,1240
United States. See also name of other party.
U. S. Congress; Brown *v.* 1195
U. S. Court of Appeals; Arteaga *v.* 1204
U. S. Court of Appeals; Calvo *v.* 1187
U. S. Court of Appeals; Free *v.* 1144
U. S. Court of Appeals; Graves *v.* 1124
U. S. Court of Appeals; Shieh *v.* 343,1186
U. S. District Court; Adams *v.* 1224
U. S. District Court; Scott *v.* 1171
U. S. District Judge; Curiale *v.* 1152
U. S. District Judge; Thornbrugh *v.* 1213
U. S. District Judge; Tilli *v.* 1227
United States Fidelity & Guaranty Co.; Schwarz *v.* 1226
United States Fidelity & Guaranty Ins. Co.; Knight *v.* 1134
United States Fidelity & Guaranty Ins. Co.; Steve Knight Steel Fabricators *v.* 1134
"United States Marshal Edmo"; Harvey *v.* 1145

Page
U. S. Postal Service; Morata *v.* 1151
United States Soccer Federation; Nava *v.* 1225
United States Surgical Corp. *v.* Ethicon, Inc. 1164
University of Houston *v.* Chavez 1184
University of Houston; Chavez *v.* 1187
University of N. M.; Moomchi *v.* 1224
Unknown Heads of Clandestine Secret Bodies of Lexington Correc. Ctr. Mail Room & Lit. Rev. Comm. Members; Shabazz *v.* 1236
Urban Homeowners' Corp. of New Orleans; Abrams *v.* 1165
Urena-Vasquez *v.* United States 1128
Ursery; United States *v.* 1102,1153
USA Recycling, Inc. *v.* Babylon 1135
Usher *v.* Duncan 1197
Usry *v.* United States 1128
USX Corp.; American Premier Underwriters, Inc. *v.* 1221
Utah; Duell *v.* 1247
Utah; Glasscock *v.* 1247
Utah State Tax Comm'n; Maryboy *v.* 1220
Uzowuru *v.* Williams Brothers Construction Co. 1152
Vahosky *v.* United States 1199
Vallejo *v.* United States 1148
Van Antwerpen; Tilli *v.* 1227
Van Dyke; Mier *v.* 1103
Van Oss; Hernandez *v.* 1213
Vanyo *v.* Fargo Women's Health Organization, Inc. 1168
Vargas *v.* Garner 1108
Vargas *v.* Gunn 1107,1230
Vasquez *v.* Hernandez 1156
Veneman *v.* Pacific Merchant Shipping Assn. 1221
Vera; Bush *v.* 952
Vera; Lawson *v.* 952
Vera; United States *v.* 952
Verdugo *v.* California State Univ. at Los Angeles 1151
Vermont; Reynolds *v.* 1237
Vickaryous *v.* United States 1199
Viclo Realty Co.; Gaston *v.* 1169
Victory Savings Bank; Dingle *v.* 1122
Villabona-Garnica *v.* United States 1114
Village. See name of village.
Vining Industries, Inc.; Libman Co. *v.* 1234
Violette; Smith & Nephew Dyonics, Inc. *v.* 1167
Virginia; Al-Wahhab *v.* 1172
Virginia; Downs *v.* 1249
Virginia; Fry *v.* 1110

Page
Virginia; Goodman *v.* 1147
Virginia; Hawes *v.* 1245
Virginia; Moore *v.* 1200
Virginia; Sartin *v.* 1125,1216
Virginia; Sheppard *v.* 1110
Virginia; Wechsler *v.* 1245
Virginia Beach; Harris *v.* 1167
Virginia Dept. of Taxation; Hyman *v.* 1128
Virgin Islands; Peterson *v.* 1231
Virta *v.* United States 1199
Vista del Mar; Franklyn *v.* 1169,1252
Voigt *v.* Savell 1209
V-1 Oil Co. *v.* United States 1208
V-1 Propane *v.* United States 1208
Votteler *v.* United States 1230
Vrba *v.* Milton S. Katz & Associates 1213
W. *v.* Margene L. 1226
Wachtler; Rosenberg *v.* 1120
Walden *v.* Arizona 1146
Walker *v.* Ames 1123
Walker *v.* Iowa 1109
Walker *v.* United States 1250
Wall, *In re* 1153
Wallace *v.* Smith 1205
Walls *v.* North Carolina 1197
Walp *v.* Goodwin 1160
Walsh *v.* Ivkovich 1168
Walt Disney Co.; Bourne *v.* 1240
Walt Disney Co.; Bourne Co. *v.* 1240
Wapnick *v.* United States 1187
Ward; Brewer *v.* 1164
Ward *v.* Turner 1152
Warden. See name of warden.
Warden, Md. House of Correction; Nasim *v.* 1163
Warmus *v.* Melahn 1241
Warner-Jenkinson Co. *v.* Hilton Davis Chemical Co. 1218
Warren, *In re* 1132
Warren *v.* Keane 1248
Washington *v.* Glucksberg 1241
Washington; Hadley *v.* 1111
Washington; Harvey *v.* 1196
Washington; Jones *v.* 1195
Washington; Lucien *v.* 1108
Washington; Misch *v.* 1225

Page
Washington *v.* Spokane Tribe of Indians 1129
Washington *v.* United States 1197
Washington; Wilson *v.* 1233
Washington Suburban Sanitary Comm'n *v.* Westfarm Associates Ltd. Partnership 1103
Waterfront Comm'n of N. Y. Harbor; Carson *v.* 1210
Watkis *v.* West 1204
Watson *v.* United States 1239
Watts *v.* United States 1128
Waymer *v.* United States 1119,1216
Weaver; Solventes y Quimica de Nicaragua, S. A. Solquimisa *v.* 1156
Webb *v.* Commissioner 1244
Webb *v.* Fields 1143
Weber *v.* Wood 1214
Wechsler *v.* Virginia 1245
Weinberg *v.* Management Co. Entertainment Group 1191
Weinig, *In re* 1242
Weitzman; Fraidin *v.* 1219
Welborn; Nobles *v.* 1171
Welborn; Sharif *v.* 1171
Welby; Johnson *v.* 1205
Wells, *In re* 1130
Wells; Britt *v.* 1213
Wells; United States *v.* 1154
Wells County; Chapa *v.* 1137
Wener; Maydak *v.* 1236
Werner *v.* United States 1119
Wesley *v.* Jenkins 1194
West *v.* Johnson 1198
West; Watkis *v.* 1204
Westfarm Associates Ltd. Partnership; Washington Suburban Sanitary Comm'n *v.* 1103
Westland Development Co. *v.* Albuquerque 1244
West One Bank (Idaho); Shelstad *v.* 1156
Westview Instruments, Inc.; Markman *v.* 370
Whalen; Castner *v.* 1126
Wharton *v.* Pennsylvania 1247
Wheeler *v.* Illinois 1193
Wheless; Youngs *v.* 1184,1247
Wherehouse Entertainment, Inc. *v.* McMahan & Co. 1190
White; Faunce *v.* 1212
White *v.* New York State Workers' Compensation Bd. 1144
White *v.* Taylor 1103
White *v.* Zimmers 1171

Page
Whitmore *v.* Federal Election Comm'n 1155
Whren *v.* United States 806
Wichita Falls State Hospital; Brooks *v.* 1214
Wilburta T. Holden Living Trust *v.* Joint City-County Bd. of Tax Assessors 1167
Wileman Brothers & Elliott, Inc. *v.* Glickman 1233
Wileman Brothers & Elliott, Inc.; Glickman *v.* 1232
Williams, *In re* 1186
Williams *v.* Abbey Medical, Inc. 1239
Williams *v.* Bowersox 1129
Williams; Bowersox *v.* 345
Williams *v.* Calderon 1183
Williams *v.* California 1159
Williams *v.* Love 1192
Williams *v.* National Basketball Assn. 1153
Williams *v.* United States 1148,1157,1228,1239
Williams *v.* Workers' Compensation Appeals Bd. 1248
Williams Brothers Construction Co.; Uzowuru *v.* 1152
Williamson; American Pioneer Life Ins. Co. *v.* 1231
Willis *v.* Bell, Rosenberg & Hughes 1193
Willis *v.* General Dynamics Corp. 1104
Willis *v.* Georgia Dept. of Public Safety 1210
Willis *v.* Shelby County Information Technology 1104
Wilson *v.* State Farm Fire & Casualty Ins. Co. 1135
Wilson *v.* United States 1246
Wilson *v.* Washington 1233
Windelberg *v.* Thompson 1196
Windle *v.* United States 1115
Winegarden; McCauley *v.* 1149
Wingo *v.* United States 1116
Winstar Corp.; United States *v.* 1118,1185
Winston & Strawn *v.* Hyatt Regency Phoenix Hotel Co. 1234
Winter *v.* United States 1126
Winters *v.* Ohio Adult Parole Authority 1123
Wisconsin; Duquette *v.* 1201
Wisconsin *v.* New York City 1
Witkowski; Oliver *v.* 1107
Witt, *In re* 1185
Wodarski *v.* American Mfrs. Mut. Ins. Co. 1135
Wolf; Rodriguez *v.* 1204
Wolfberg *v.* Greenberg 1219
Wolfe *v.* Montana Dept. of Corrections and Human Services 1192
Wolff; Hosier *v.* 1197
Wonderly *v.* United States 1146

Page
Wood; Weber *v.* 1214
Woodbury *v.* Sears, Roebuck & Co. 1160
Woodford; Swendra *v.* 1196
Woods *v.* Purkett 1110
Wootton *v.* Florida 1249
Worcester County Dept. of Social Services; Newman *v.* 1136
Worcester County Institution for Savings; Simone *v.* 1151
Workers' Compensation Appeals Bd.; Williams *v.* 1248
Wornum *v.* Massachusetts 1214
Worthey *v.* Collins 1235
Wright *v.* Brown 1159
Wright *v.* Delaware 1249
Wright *v.* Reich 1237
Wright *v.* United States 1149,1163
Wyldes *v.* Hundley 1172
Wynn *v.* AC Rochester 1151
Yarnell *v.* United States 1201
Yates *v.* Godwin 1159,1230
Ybarra *v.* United States 1174
Yeoman *v.* Dilley 1196
Yildirim *v.* United States 1162
Youell; Exxon Corp. *v.* 1251
Young *v.* Culver City 1151
Young *v.* Harper 1219
Young *v.* Office of Personnel Management 1190
Youngs *v.* Wheless 1184,1247
Youpee; Babbitt *v.* 1232
Zankich *v.* Allen 1159
Zapata, *In re* 1132
Zavaras; Tafoya *v.* 1195
Zayas *v.* Brown 1124,1205
Zhadanov *v.* United States 1169
Zilich *v.* Mazurkiewicz 1248
Zimmers; White *v.* 1171
Ziomek *v.* San Francisco 1137
Zolt *v.* Bingham 1134,1230
Zzie *v.* United States 1113

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1995

WISCONSIN *v.* CITY OF NEW YORK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 94–1614. Argued January 10, 1996—Decided March 20, 1996*

The Constitution's Census Clause vests Congress with the responsibility to conduct an "actual Enumeration" of the American public every 10 years, with the primary purpose of providing a basis for apportioning congressional representation among the States. That responsibility has been delegated to the Secretary of Commerce, who determined that an "actual Enumeration" would best be achieved in the 1990 census by not using a postenumeration survey (PES) statistical adjustment designed to correct an undercount in the initial enumeration. In this action brought by several of the respondents and others, the District Court concluded that the Secretary's decision not to statistically adjust the census violated neither the Constitution nor federal law. In reversing and remanding, the Court of Appeals looked to a line of precedent involving judicial review of intrastate districting decisions, see *Wesberry* v. *Sanders,* 376 U. S. 1, and its progeny, and held, *inter alia,* that a heightened standard of review was required here because the Secretary's decision impacted the fundamental right to have one's vote counted and had a disproportionate impact upon certain identifiable minority racial groups.

---

*Together with No. 94–1631, *Oklahoma* v. *City of New York et al.,* and No. 94–1985, *Department of Commerce et al.* v. *City of New York et al.,* also on certiorari to the same court.

Held: Because it was reasonable to conclude that an "actual Enumeration" could best be achieved in the 1990 census without the PES-based statistical adjustment, the Secretary's decision not to use that adjustment was well within the constitutional bounds of discretion over the conduct of the census that is provided to the Federal Government. Pp. 13–24.

(a) The Secretary's decision was not subject to heightened scrutiny. In two recent decisions, *Department of Commerce* v. *Montana*, 503 U. S. 442, and *Franklin* v. *Massachusetts*, 505 U. S. 788, this Court rejected the application of *Wesberry*'s "one person-one vote" standard to Congress, concluding that the Constitution vests Congress with wide discretion over apportionment decisions and the conduct of the census, and that the appropriate standard of review examines a congressional decision to determine whether it is "consistent with the constitutional language and the constitutional goal of equal representation," see *Franklin, supra,* at 804. Rather than the strict scrutiny standard applied in *Wesberry* and adopted by the Court of Appeals, the standard established in *Montana* and *Franklin* applies to the Secretary's decision here. The Constitution's text vests Congress with virtually unlimited discretion in conducting the "actual Enumeration," see Art. I, §2, cl. 3 (Congress may conduct the census "in such Manner as they shall by Law direct"), and there is no basis for thinking that such discretion is more limited than that text provides. Through the Census Act, 13 U. S. C. §141(a), Congress has delegated its broad authority over the census to the Secretary. Hence, so long as the Secretary's conduct of the census is "consistent with the constitutional language and the constitutional goal of equal representation," it is within the Constitution's limits. Pp. 13–20.

(b) The Secretary's decision conformed to applicable constitutional and statutory provisions. In light of the Constitution's broad grant of authority to Congress, that decision need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the census' constitutional purpose of apportioning congressional representation. The Secretary based the decision upon three determinations, each of which is well within the bounds of his constitutional discretion. First, he held that in light of the constitutional purpose, the census' distributive accuracy—*i. e.*, getting most nearly correct the proportions of people in different areas—was more important than its numerical accuracy. A preference for distributive accuracy (even at the expense of some numerical accuracy) is not inconsistent with the constitutional need to determine the apportionment of the Representatives among the States. Second, the Secretary's determination that the unadjusted census data should be considered the most distributively accurate absent a showing to the contrary was based on his well-founded understanding of historical census practice and experience, an important consideration in this context. See, *e. g., Montana, supra,* at 465. Respondents misplace their reliance on statistical adjustments that were used in the 1970 and 1980 censuses, since those adjustments were of an entirely different type than the one at issue and took place on a dramatically smaller scale, and since a PES-based adjustment would have been the first time in history that the States' apportionment was based upon counts in other States. Third, respondents' contention that this Court should review *de novo* the Secretary's conclusions on this point fundamentally misapprehends the basis for deference to his determination, which arises not from the highly technical nature of his decision, but from the wide discretion bestowed by the Constitution upon Congress, and by Congress upon him. The Secretary's conclusion that the PES-based adjustment would not improve distributive accuracy, which was based on his review of extensive research and the recommendations of some of his advisers, was a reasonable choice in an area where technical experts disagree. Pp. 20–24.

34 F. 3d 1114, reversed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Solicitor General Days argued the cause for the federal petitioners. With him on the briefs were *Assistant Attorney General Hunger, Deputy Solicitor General Kneedler, Malcolm L. Stewart,* and *Mark B. Stern. James E. Doyle,* Attorney General of Wisconsin, argued the cause for petitioners in No. 94–1614 and No. 94–1631. With him on the brief for petitioner in No. 94–1614 was *Peter C. Anderson,* Assistant Attorney General. *Don G. Holladay* and *Shelia D. Tims* filed briefs for petitioner in No. 94–1631.

Robert S. Rifkind argued the cause for respondents in all cases. With him on the brief were *Paul A. Crotty, Lorna B. Goodman, Peter L. Zimroth, Dennis C. Vacco,* Attorney General of New York, *Victoria Graffeo,* Solicitor General, *Barbara Billet,* Deputy Solicitor General, and *Lula Anderson,* Assistant Attorney General, *James K. Hahn, Susan S. Sher, Benna Ruth Solomon, Robert A. Ginsburg, Helen M. Gros, Dennis Hayes, Frank Shafroth, Dan Morales,* Attorney General of Texas, and *Javier P. Guajardo,* Special Assistant Attorney General, *Robert A. Butterworth,* Attorney

General of Florida, and *George L. Waas,* Assistant Attorney General, *Deborah T. Poritz,* Attorney General of New Jersey, and *Michael S. Bokar,* Senior Deputy Attorney General, *Grant Woods,* Attorney General of Arizona, and *Robert Carey,* First Assistant Attorney General, *Tom Udall,* Attorney General of New Mexico, and *Christopher D. Coppin,* Assistant Attorney General, *Ada Treiger, John J. Copelan, Jr., Louise Renne, Burk E. Delventhal, Stan M. Sharoff, T. Michael Mather, John P. Frank, Avis M. Russell, Nicholas Rodriguez, Robert Cohen, Michael W. L. McCrory, George Rios, Burton H. Levin, Pastel Vann,* Assistant Corporation Counsel for the District of Columbia, and *Kendrick Smith.*†

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In conducting the 1990 United States Census, the Secretary of Commerce decided not to use a particular statistical adjustment that had been designed to correct an undercount in the initial enumeration. The Court of Appeals for the Second Circuit held that the Secretary's decision was subject to heightened scrutiny because of its effect on the right of individual respondents to have their vote counted equally. We hold that the Secretary's decision was not subject to heightened scrutiny, and that it conformed to applicable constitutional and statutory provisions.

---

†Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Pennsylvania by *Thomas W. Corbett, Jr.,* Attorney General, and *John G. Knorr III,* Chief Deputy Attorney General; and for United States Senator Herb Kohl et al. by *Brady C. Williamson.*

Briefs of *amici curiae* urging affirmance were filed for the City of Detroit by *Linda D. Fegins;* and for the Lawyers' Committee for Civil Rights Under Law et al. by *Jonathan L. Greenblatt, Paul C. Saunders, Herbert J. Hansell, Norman Redlich, Barbara R. Arnwine, Thomas J. Henderson, Christopher A. Hansen, Steven R. Shapiro, Samuel Rabinove, Elaine R. Jones, Theodore M. Shaw, Charles Stephen Ralston,* and *Arthur N. Eisenberg.*

I

The Constitution requires an "actual Enumeration" of the population every 10 years and vests Congress with the authority to conduct that census "in such Manner as they shall by Law direct."[1] Art. I, § 2, cl. 3. Through the Census Act, 13 U. S. C. § 1 *et seq.*, Congress has delegated to the Secretary of the Department of Commerce the responsibility to take "a decennial census of [the] population . . . in such form and content as he may determine . . . ." § 141(a). The Secretary is assisted in the performance of that responsibility by the Bureau of the Census and its head, the Director of the Census. See § 2; § 21 ("[The] Director shall perform such duties as may be imposed upon him by law, regulations, or orders of the Secretary").

The Constitution provides that the results of the census shall be used to apportion the Members of the House of Representatives among the States. See Art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . ."); Amdt. 14, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . ."). Because the Constitution provides that the number of Representatives apportioned to each State determines in part the allocation to each State of votes for the election of the President, the decennial census also affects the allocation of members of the electoral college. See Art. II, § 1, cl. 2 ("Each State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . ."). Today, census data also have important consequences not delineated in the Constitution: The Federal Government considers census data in dispensing funds through federal programs to the States, and the States use the results in drawing intrastate political districts.

---

[1] The Census Clause provides in full: "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." Art. I, § 2, cl. 3.

There have been 20 decennial censuses in the history of the United States. Although each was designed with the goal of accomplishing an "actual Enumeration" of the population, no census is recognized as having been wholly successful in achieving that goal.[2] Cf. *Karcher* v. *Daggett*, 462 U. S. 725, 732 (1983) (recognizing that "census data are not perfect," and that "population counts for particular localities are outdated long before they are completed"); *Gaffney* v. *Cummings*, 412 U. S. 735, 745 (1973) (census data "are inherently less than absolutely accurate"). Despite consistent efforts to improve the quality of the count, errors persist. Persons who should have been counted are not counted at all or are counted at the wrong location; persons who should not have been counted (whether because they died before or were born after the decennial census date, because they were not a resident of the country, or because they did not exist) are counted; and persons who should have been counted only once are counted twice. It is thought that these errors have resulted in a net "undercount" of the actual American population in every decennial census. In 1970, for instance, the Census Bureau concluded that the census results were 2.7% lower than the actual population.[3] Brief for Respondents 12.

---

[2] Indeed, even the first census did not escape criticism. Thomas Jefferson, who oversaw the conduct of that census in 1790 as Secretary of State, was confident that it had significantly undercounted the young Nation's population. See C. Wright, History and Growth of the United States Census 16–17 (1900).

[3] One might wonder how the Census Bureau is able to determine whether there is an undercount and its size. Specifically: Against what standard are the census results measured? After all, if the *actual* population of the United States is known, then the conduct of the census would seem wholly redundant.

For the most part, we are told, the size of the error in a particular census is determined by comparing the census results not with some defi-

The undercount is not thought to be spread consistently across the population: Some segments of the population are "undercounted" to a greater degree than are others, resulting in a phenomenon termed the "differential undercount." Since at least 1940, the Census Bureau has thought that the undercount affects some racial and ethnic minority groups to a greater extent than it does whites. In 1940, for example, when the undercount for the entire population was 5.4%, the undercount for blacks was estimated at 8.4% (and the undercount for whites at 5.0%). *Ibid.* The problem of the differential undercount has persisted even as the census has come to provide a more numerically accurate count of the population. In the 1980 census, for example, the overall undercount was estimated at 1.2%, and the undercount of blacks was estimated at 4.9%. *Ibid.*

The Census Bureau has recognized the undercount and the differential undercount as significant problems, and in the past has devoted substantial effort toward achieving their reduction. Most recently, in its preparations for the 1990 census, the Bureau initiated an extensive inquiry into various means of overcoming the impact of the undercount and the differential undercount. As part of this effort, the Bureau created two task forces: the Undercount Steering Committee, responsible for planning undercount research and policy development; and the Undercount Research Staff (URS), which conducted research into various methods of improving the accuracy of the census. In addition, the Bureau consulted with state and local governments and various outside experts and organizations.

Largely as a result of these efforts, the Bureau adopted a wide variety of measures designed to reduce the rate of

---

nite and established measure of the population, but rather with estimates of the population developed from demographic data. See App. to Pet. for Cert. in No. 94–1614, pp. 158a–168a, 366a–369a (hereinafter Pet. App.). A similar procedure traditionally has been used to determine the size and makeup of the differential undercount, see *infra,* at 9–10.

error in the 1990 enumeration, including an extensive advertising campaign, a more easily completed census questionnaire, and increased use of automation, which among other things facilitated the development of accurate maps and geographic files for the 1990 census. Pet. App. 321a–322a.[4] The Bureau also implemented a number of improvements specifically targeted at eliminating the differential undercount; these included advertising campaigns developed by and directed at traditionally undercounted populations and expanded questionnaire assistance operations for non-English speaking residents. *Ibid.*

In preparing for the 1990 census, the Bureau and the task forces also looked into the possibility of using large-scale statistical adjustment to compensate for the undercount and differential undercount. Although the Bureau had previously considered that possibility (most recently in 1980), it always had decided instead to rely upon more traditional methodology and the results of the enumeration. See *Cuomo* v. *Baldrige*, 674 F. Supp. 1089 (SDNY 1987) (noting that Bureau rejected large-scale statistical adjustment of the 1980 census). In 1985, preliminary investigations by the URS suggested that the most promising method of statistical adjustment was the "capture-recapture" or "dual system estimation" (DSE) approach.

The particular variations of the DSE considered by the Bureau are not important for purposes of this opinion, but an example may serve to make the DSE more understandable. Imagine that one wanted to use DSE in order to determine the number of pumpkins in a large pumpkin patch. First, one would choose a particular section of the patch as the representative subset to which the "recapture" phase will be applied. Let us assume here that it is a section exactly one-tenth the size of the entire patch that is selected. Then, at the next step—the "capture" stage—one would conduct a fairly quick count of the entire patch, making sure to record both the number of pumpkins counted in the entire patch and the number of pumpkins counted in the selected section. Let us imagine that this stage results in a count of 10,000 pumpkins for the entire patch and 1,000 pumpkins for the selected section. Next, at the "recapture" stage, one would perform an exacting count of the number of pumpkins in the selected section. Let us assume that we now count 1,100 pumpkins in that section. By comparing the results of the "capture" phase and the results of the "recapture" phase for the selected section, it is possible to estimate that approximately 100 pumpkins actually in the patch were missed for every 1,000 counted at the "capture" phase. Extrapolating this data to the count for the entire patch, one would conclude that the actual number of pumpkins in the patch is 11,000.

---

[4] All references to Pet. App. are to the appendix to the petition for certiorari in No. 94–1614 unless otherwise noted.

In the context of the census, the initial enumeration of the entire population (the "capture") would be followed by the postenumeration survey (PES) (the "recapture") of certain representative geographical areas. The Bureau would then compare the results of the PES to the results of the initial enumeration for those areas targeted by the PES, in order to determine a rate of error in those areas for the initial enumeration (*i. e.*, the rate at which the initial enumeration undercounted people in those areas). That rate of error would be extrapolated to the entire population, and thus would be used to statistically adjust the results of the initial enumeration.

The URS thought that the PES also held some promise for correcting the differential undercount. The PES would be conducted through the use of a system called poststratification. Thus, each person counted through the PES would be placed into one, and only one, of over 1,000 poststrata defined by five categories: geography; age; sex; status of housing unit (rent versus own); and race (including Hispanic versus non-Hispanic origin).[5] By comparing the poststratified PES data to the results of the initial enumeration, the Bureau would be able to estimate not only an overall undercount rate, but also an undercount rate for each poststrata. Hence, the statistical adjustment of the census could reflect differences in the undercount rate for each poststrata.

Through the mid-1980's, the Bureau conducted a series of field tests and statistical studies designed to measure the utility of the PES as a tool for adjusting the census. The Director of the Bureau decided to adopt a PES-based adjustment, and in June 1987, he informed his superiors in the Department of Commerce of that decision. The Secretary of Commerce disagreed with the Director's decision to adjust, however, and in October 1987, the Department of Commerce announced that the 1990 census would not be statistically adjusted.

In November 1988, several plaintiffs (including a number of the respondents in this action) brought suit in the United States District Court for the Eastern District of New York, arguing that the Secretary's decision against statistical adjustment of the 1990 census was unconstitutional and contrary to federal law. The parties entered into an interim stipulation providing, *inter alia*, that the Secretary would reconsider the possibility of a statistical adjustment.

In July 1991, the Secretary issued his decision not to use the PES to adjust the 1990 census. Pet. App. 135a–415a. The Secretary began by noting that large-scale statistical adjustment of the census through the PES would "abandon a two hundred year tradition of how we actually count people." *Id.*, at 138a. Before taking a "step of that magnitude," he held, it was necessary to be "certain that it would make the census better and the distribution of the population more accurate." *Ibid.* Emphasizing that the primary purpose of the census was to apportion political representation among the States, the Secretary concluded that "the primary criterion for accuracy should be distributive accuracy—that is, getting most nearly correct the proportions of people in different areas." *Id.*, at 146a–147a.

---

[5] Examples of poststrata actually used include: female blacks between the ages of 20 and 29 who owned a home in either Detroit or Chicago; nonblack non-Hispanic females, aged 45–64, living in owned or rented housing in a nonmetropolitan area with a population of 10,000 or more in Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, or Wyoming; and male Asians or Pacific Islanders, aged 65 or above, renting a home in either the Los Angeles-Long Beach area or another central city in a metropolitan area in Alaska, California, Hawaii, Oregon, or Washington.

After reviewing the recommendations of his advisers and the voluminous statistical research that had been compiled, the Secretary concluded that although numerical accuracy (at the national level) might be improved through statistical adjustment, he could not be confident that the distributive accuracy of the census—particularly at the state and local level—would be improved by a PES-based adjustment.[6] *Id.*, at 140a–141a, 200a–201a. In particular, the Secretary noted, the adjusted figures became increasingly unreliable as one focused upon smaller and smaller political subdivisions. *Id.*, at 142a.

The Secretary stated that his decision not to adjust was buttressed by a concern that adjustment of the 1990 census might present significant problems in the future. *Id.*, at 143a. Because small changes in adjustment methodology would have a large impact upon apportionment—an impact that could be determined before a particular methodology was chosen—the Secretary found that statistical adjustment of the 1990 census might open the door to political tampering in the future. The Secretary also noted that statistical adjustment might diminish the incentive for state and local political leaders to assist in the conduct of the initial enumeration. See *id.*, at 143a–144a. In conclusion, the Secretary stated that the Bureau would continue its research into the possibility of statistical adjustment of future censuses, and would maintain its efforts to improve the accuracy and inclusiveness of the initial enumeration. *Id.*, at 145a.

---

[6] The distinction between distributive and numerical accuracy becomes clear with an example. Imagine that the Bureau somehow were able to determine definitely that the census had failed to count exactly 10 million people nationwide. If those 10 million "persons" were added to the Nation's total population, and all 10 million were allocated to one particular State, then the numerical accuracy of the census would be improved, but the distributive accuracy would almost certainly be significantly impaired.

The plaintiffs returned to court. The District Court concluded that the Secretary's decision violated neither the Constitution nor federal law. See *New York* v. *United States Dept. of Commerce*, 822 F. Supp. 906 (EDNY 1993).

Respondents appealed, arguing that the District Court had adopted the wrong standard of review for their constitutional claim,[7] and the Court of Appeals for the Second Circuit reversed by a divided vote. 34 F. 3d 1114 (1994); Pet. App. 1a–40a. The majority looked to a line of precedent involving judicial review of intrastate districting decisions, see, *e. g., Karcher* v. *Daggett*, 462 U. S. 725 (1983); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), and found that a heightened standard of review was required here both because the Secretary's decision impacted a fundamental right, viz., the right to have one's vote counted, and because the decision had a disproportionate impact upon certain identifiable minority racial groups. 34 F. 3d, at 1128. The court then held that the plaintiffs had shown that the Secretary had failed to make a good-faith effort to achieve equal districts as nearly as possible, *id.*, at 1130, and therefore that the defendants must bear the burden of proving that population deviations were necessary to achieve some legitimate state goal, *id.*, at 1131. The court remanded for an inquiry into whether the Secretary could show that the decision not to adjust was essential for the achievement of a legitimate governmental objective. *Ibid.*

---

[7] Respondents did not appeal the District Court's treatment of their statutory claims.

The dissenting judge stated that he would have affirmed based upon the decision of the District Court. See *ibid.* He also noted that the majority's decision created a conflict with two other decisions of the Courts of Appeals. See *Detroit* v. *Franklin,* 4 F. 3d 1367 (CA6 1993), and *Tucker* v. *United States Dept. of Commerce,* 958 F. 2d 1411 (CA7 1992).

Wisconsin, Oklahoma, and the United States each filed a petition for certiorari. We granted those petitions, and consolidated them for argument. 515 U. S. 1190 (1995). We now reverse.

II

In recent years, we have twice considered constitutional challenges to the conduct of the census. In *Department of Commerce* v. *Montana,* 503 U. S. 442 (1992), the State of Montana, several state officials, and Montana's Members of Congress brought suit against the Federal Government, challenging as unconstitutional the method used to determine the number of Representatives to which each State is entitled. A majority of a three-judge District Court looked to the principle of equal representation for equal numbers of people that was applied to intrastate districting in *Wesberry* v. *Sanders, supra,* and held it applicable to congressional apportionment of seats among the States. Noting a significant variance between the population of Montana's single district and the population of the "ideal district," the court found that Congress' chosen method of apportionment violated the principle of *Wesberry,* and therefore voided the federal statute providing the method of apportionment.

In a unanimous decision, this Court reversed. We began by revisiting *Wesberry,* a case in which the Court held unconstitutional wide disparities in the population of congressional districts drawn by the State of Georgia. *Montana, supra,* at 459–460. We recognized that the principle of *Wesberry*— " 'equal representation for equal numbers of people' "—had evolved though a line of cases into a strictly enforced requirement that a State "'make a good-faith effort to achieve precise mathematical equality'" among the populations of congressional districts. See *Montana, supra,* at 460, quoting *Kirkpatrick* v. *Preisler,* 394 U. S. 526, 530–531 (1969) (disparities between congressional districts in Missouri held unconstitutional); see also *Karcher* v. *Daggett, supra* (1% disparity between population of New Jersey districts held unconstitutional). Returning to Montana's challenge to Congress' apportionment decision, we noted that the *Wesberry* line of cases all involved intrastate disparities in the population of voting districts that had resulted from a State's redistricting decisions, whereas Montana had challenged interstate disparities resulting from the actions of Congress. *Montana, supra,* at 460.

We found this difference to be significant beyond the simple fact that Congress was due more deference than the States in this area. *Wesberry* required a State to make "a good-faith effort to achieve precise mathematical equality" in the size of voting districts. *Kirkpatrick, supra,* at 530–531. While this standard could be applied easily to intrastate districting because there was no "theoretical incompatibility entailed in minimizing both the absolute and the relative differences" in the sizes of particular voting districts, we observed that it was not so easily applied to interstate districting decisions where there was a direct tradeoff between absolute and relative differences in size. *Montana, supra,* at 461–462. Finding that Montana demanded that we choose between several measures of inequality in order to hold the *Wesberry* standard applicable to congressional apportionment decisions, we concluded that "[n]either mathematical analysis nor constitutional interpretation provide[d] a conclusive answer" upon which to base that choice. *Montana, supra,* at 463.

We further found that the Constitution itself, by guaranteeing a minimum of one representative for each State, made it virtually impossible in interstate apportionment to achieve the standard imposed by *Wesberry*. *Montana, supra,* at 463. In conclusion, we recognized the historical pedigree of the challenged method of apportionment, and reemphasized that Congress' "good-faith choice of a method of apportionment of Representatives among the several States 'according to their respective Numbers' commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Montana, supra,* at 464.

In *Franklin* v. *Massachusetts,* 505 U. S. 788 (1992), we reiterated our conclusion that the Constitution vests Congress with wide discretion over apportionment decisions and the conduct of the census. In *Franklin,* the State of Massachusetts and two of its registered voters sued the Federal Government, arguing that the method used by the Secretary to count federal employees serving overseas was (among other things) unconstitutional. Restating the standard of review established by *Montana,* we examined the Secretary's decision in order to determine whether it was "consistent with the constitutional language and the constitutional goal of equal representation." See *Franklin, supra,* at 804; *Montana, supra,* at 459. After a review of the historical practice in the area, we found that the plaintiffs had not met their burden of proving that a decision contrary to that made by the Secretary would "make representation . . . more equal." *Franklin,* 505 U. S., at 806. Concluding that the Secretary's decision reflected a "judgment, consonant with, though not dictated by, the text and history of the Constitution . . . ," we held the Secretary's decision to be well within the constitutional limits on his discretion. *Ibid.*

In its decision in this action, the Court of Appeals found that a standard more strict than that established in *Montana* and *Franklin* should apply to the Secretary's decision not to statistically adjust the census. The court looked to equal protection principles distilled from the same line of state redistricting cases relied upon by the plaintiffs in *Montana,* and found that both the nature of the right asserted by respondents—the right to have one's vote counted equally—and the nature of the affected classes—"certain identifiable minority groups"—required that the Secretary's decision be given heightened scrutiny. 34 F. 3d, at 1128. The court drew from the District Court's decision "implicit" findings: that the census did not achieve equality of voting power as nearly as practicable; "that for most purposes and for most of the population [the PES-based] adjustment would result in a more accurate count than the original census; and that the adjustment would lessen the disproportionate undercounting of minorities." *Id.*, at 1129.

The court recognized two significant differences between the intrastate districting cases and the instant action: first, that this case involves the federal rather than a state government; and second, that constitutional requirements make it impossible to achieve precise equality in voting power nationwide. *Ibid.* But it found these differences nondeterminative, deciding that no deference was owed to the Executive Branch on a question of law, and that the "impossibility of achieving precise mathematical equality is no excuse for [the Federal Government] not making [the] mandated good-faith effort." *Ibid.* The court found that the respondents here had established a prima facie violation of the *Wesberry* standard both by showing that the PES-based adjustment would increase numerical accuracy, and by virtue of the fact that "the differential undercount in the 1990 enumeration was plainly foreseeable and foreseen." 34 F. 3d, at 1130–1131. The court held that the Secretary's decision would have to be vacated as unconstitutional unless on remand he could show that the decision not to adjust "(a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective." *Id.*, at 1131.

We think that the Court of Appeals erred in holding the "one person-one vote" standard of *Wesberry* and its progeny applicable to the action at hand. For several reasons, the "good-faith effort to achieve population equality" required of a State conducting intrastate redistricting does not translate into a requirement that the Federal Government conduct a census that is as accurate as possible. First, we think that the Court of Appeals understated the significance of the two differences that it recognized between state redistricting cases and the instant action. The court failed to recognize that the Secretary's decision was made pursuant to Congress' direct delegation of its broad authority over the census. See Art. I, §2, cl. 3 (Congress may conduct the census "in such Manner as they shall by Law direct"). The court also undervalued the significance of the fact that the Constitution makes it impossible to achieve population equality among interstate districts. As we have noted before, the Constitution provides that "[t]he number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and district boundaries may not cross state lines." *Montana*, 503 U. S., at 447–448.

While a court can easily determine whether a State has made the requisite "good-faith effort" toward population equality through the application of a simple mathematical formula, we see no way in which a court can apply the *Wesberry* standard to the Federal Government's decisions regarding the conduct of the census. The Court of Appeals found that *Wesberry* required the Secretary to conduct a census that would "achieve voting-power equality," which it understood to mean a census that was as accurate as possible. 34 F. 3d, at 1129. But in so doing, the court implicitly found that the Constitution prohibited the Secretary from preferring distributive accuracy to numerical accuracy, and that numerical accuracy—which the court found to be improved by a PES-based adjustment—was constitutionally preferable to distributive accuracy. See *id.*, at 1131 ("[T]he Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable, . . . the burden thus shifted to the Secretary to justify his decision not to adjust . . ."). As in *Montana*, where we could see no constitutional basis upon which to choose between absolute equality and relative equality, so here can we see no ground for preferring numerical accuracy to distributive accuracy, or for preferring gross accuracy to some particular measure of accuracy. The Constitution itself provides no real instruction on this point, and extrapolation from our intrastate districting cases is equally unhelpful. Quite simply, "[t]he polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course." *Montana, supra*, at 463.

In *Montana*, we held that Congress' "apparently good-faith choice of a method of apportionment of Representatives among the several States 'according to their respective Numbers'" was not subject to strict scrutiny under *Wesberry*. *Montana, supra*, at 464. With that conclusion in mind, it is difficult to see why or how *Wesberry* would apply to the Federal Government's conduct of the census—a context even further removed from intrastate districting than is congressional apportionment. Congress' conduct of the census, even more than its decision concerning apportionment, "commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard."[8] *Montana, supra*, at 464.

Rather than the standard adopted by the Court of Appeals, we think that it is the standard established by this

---

[8] Nor do we think that strict scrutiny applies here for some other reason. Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government. *Washington* v. *Davis*, 426 U. S. 229, 239–245 (1976). Respondents here have not argued that the Secretary's decision not to adjust was based upon an intent to discriminate on the basis of race. Indeed, in light of the Government's extraordinary efforts to include traditionally undercounted minorities in the 1990 census, see Pet. App. 78a, 321a–322a, we think that respondents here would have had a tough row to hoe had they set out to prove intentional discrimination by the Secretary.

Court in *Montana* and *Franklin* that applies to the Secretary's decision not to adjust. The text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial "actual Enumeration,"[9] see Art. I, § 2, cl. 3, and notwithstanding the plethora of lawsuits that inevitably accompany each decennial census,[10] there is no basis for thinking that Congress' discretion is more limited than the text of the Constitution provides. See also *Baldrige* v. *Shapiro*, 455 U. S. 345, 361 (1982) (noting broad scope of Congress' discretion over census). Through the Census Act, Congress has delegated its broad authority over the census to the Secretary.[11] See 13 U. S. C. § 141(a) (Secretary shall take "a decennial census of [the] population . . . in such form and content as he may determine . . ."). Hence, so long as the Secretary's conduct of the census is "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin,* 505 U. S., at 804, it is within the limits of the Constitution. In light of the Constitution's broad grant of authority to Congress, the Secretary's decision not to adjust need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census.

---

[9] We do not decide whether the Constitution might prohibit Congress from conducting the type of statistical adjustment considered here. See Brief for Petitioner in No. 94–1614, pp. 40–42.

[10] See, *e. g., Franklin* v. *Massachusetts*, 505 U. S. 788, 790 (1992) ("As one season follows another, the decennial census has again generated a number of reapportionment controversies"); *National Law Center on Homelessness and Poverty* v. *Brown*, appeal pending, No. 94–5312 (CADC) (argued Oct. 6, 1995) (challenging Census Bureau's procedures for finding and counting homeless persons); *Carey* v. *Klutznick*, 637 F. 2d 834 (CA2 1980) (seeking order directing Census Bureau to adopt certain processes for counting persons); *Borough of Bethel Park* v. *Stans*, 449 F. 2d 575 (CA3 1971).

[11] We do not here decide the precise bounds of the authority delegated to the Secretary through the Census Act. First, because no party here has suggested that Congress has, in its delegation of authority over the conduct of the census to the Secretary, constrained the Secretary's authority to decide not to adjust the census, we assume here that the Secretary's discretion not to adjust the census is commensurate with that of Congress. See Brief for Petitioner in No. 94–1614, p. 24, n. 19 (stating that "Congress did not enact any . . . legislation . . . to compel . . . statistical adjustment" of the 1990 census). Second, although Oklahoma argues that Congress has constrained the Secretary's discretion to statistically adjust the decennial census, see 13 U. S. C. § 195, we need not decide that question in order to resolve this action.

In 1990, the Census Bureau made an extraordinary effort to conduct an accurate enumeration, and was successful in counting 98.4% of the population. See 58 Fed. Reg. 70 (1993); Brief for Federal Parties 28. The Secretary then had to consider whether to adjust the census using statistical data derived from the PES. He based his decision not to adjust the census upon three determinations. First, he held that in light of the constitutional purpose of the census, its distributive accuracy was more important than its numerical accuracy. Second, he determined that the unadjusted census data would be considered the most distributively accurate absent a showing to the contrary. And finally, after reviewing the results of the PES in light of extensive research and the recommendations of his advisers, the Secretary found that the PES-based adjustment would not improve distributive accuracy. Each of these three determinations is well within the bounds of the Secretary's constitutional discretion.

As we have already seen, *supra,* at 18, the Secretary's decision to focus on distributive accuracy is not inconsistent with the Constitution. Indeed, a preference for distributive accuracy (even at the expense of some numerical accuracy) would seem to follow from the constitutional purpose of the census, viz., to determine the apportionment of the Representatives among the States. Respondents do not dispute this point. See Brief for Respondents 54 ("Distributive accuracy is an appropriate criterion for judging census accuracy because it calls attention to a concern with the uses to which census data are put"). Rather, they challenge the Secretary's first determination by arguing that he improperly "regarded evidence of superior numeric accuracy as 'not relevant' to the determination of distributive accuracy." *Id.*, at 39 (quoting Pet. App. 201a); see also Brief for Respondents 51–54. In support of this argument, respondents note that an enumeration that results in increased numerical accuracy will also result in increased distributive accuracy.

We think that respondents rest too much upon the statement by the Secretary to which they refer. When quoted in full, the statement reads: "While the preponderance of the evidence leads me to believe that the total population at the national level falls between the census counts and the adjusted figures, that conclusion is not relevant to the determination of distributive accuracy." Pet. App. 201a. In his decision, the Secretary found numerical accuracy (in addition to distributive accuracy) to be relevant to his decision whether to adjust. See *id.*, at 157a. Even if the Secretary had chosen to subordinate numerical accuracy, we are not sure why the fact that distributive and numerical accuracy correlate closely in an improved *enumeration* would require the Secretary to conclude that they correlate also for a PES-based *statistical adjustment.*

Turning to the Secretary's second determination, we previously have noted, and respondents do not dispute, the importance of historical practice in this area. See *Franklin, supra*, at 803–806 (noting importance of historical experience in conducting the census); cf. *Montana*, 503 U. S., at 465 ("To the extent that the potentially divisive and complex issues associated with apportionment can be narrowed by the adoption of both procedural and substantive rules that are consistently applied year after year, the public is well served . . ."). Nevertheless, respondents challenge the Secretary's second determination by arguing that his understanding of historical practice is flawed. According to respondents, the Secretary assumed that the census traditionally was conducted via a simple "headcount," thereby ignoring the fact that statistical adjustment had been used in both the 1970 and 1980 censuses. See Brief for Respondents 4–5.

We need not tarry long with this argument. The Secretary reasonably recognized that a PES-based statistical adjustment would be a significant change from the traditional method of conducting the census. The statistical adjustments in 1970 and 1980 to which respondents refer were of an entirely different type than the adjustment considered here, and they took place on a dramatically smaller scale. See *Cuomo* v. *Baldrige*, 674 F. Supp., at 1107 (rejecting argument that Secretary had to conduct PES-like statistical adjustment of 1980 census and finding that "none of [the] adjustments in 1970 were even remotely similar to the types of wholesale adjustments presently suggested . . ."). Moreover, the PES-based adjustment would have been the first time in history that the States' apportionment would have been based upon counts in other States. See Pet. App. 251a–252a. Here, the Secretary's understanding of the traditional method of conducting the census was well founded, as was his establishment of a rebuttable presumption that the traditional method was the most accurate.

The Secretary ultimately determined that the available evidence "tends to support the superior distributive accuracy of the actual enumeration," *id.*, at 185a, and it is this determination at which respondents direct the brunt of their attack. Respondents contend that the Secretary's review of the evidence is due no deference from this Court. They argue that the Secretary's decision is not the sort of "highly technical" administrative decision that normally commands judicial deference, and that regardless of its technical complexity, the Secretary's review of the evidence presents a constitutional issue that deserves no deference. Respondents contend that the Secretary's review of the evidence is of dubious validity because the Secretary is admittedly "not a statistician," *id.*, at 139a, and because his conclusion is at odds with that of the Director of the Census. According to respondents, we should carefully comb the Secretary's decision in order to review his conclusions *de novo.*

Respondents' argument fundamentally misapprehends the basis for our deference to the Secretary's determination that the adjusted census results do not provide a more distributively accurate count of the population. Our deference arises not from the highly technical nature of his decision, but rather from the wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary. Regardless of the Secretary's statistical expertise, it is he to whom Congress has delegated its constitutional authority over the census. For that same reason, the mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision.

Turning finally to review the Secretary's conclusion that the PES-based adjustment would not improve distributive accuracy, we need note only that the Secretary's conclusion is supported by the reasoning of some of his advisers, and was therefore a reasonable choice in an area where technical experts disagree. Cf. *Tucker* v. *United States Dept. of Commerce*, 958 F. 2d, at 1418 (Plaintiffs seeking PES-based statistical adjustment "are asking [courts] to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount"). The Under Secretary of Commerce for Economic Affairs and the Administrator of the Economics and Statistics Administration both voted against adjustment. Pet. App. 59a, 140a. Moreover, even those who recommended in favor of adjustment recognized that their conclusion was not compelled by the evidence: The Director of the Census Bureau, upon whose recommendation respondents heavily rely, stated in her report to the Secretary that "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree." App. 73. And one of the principal statisticians at the Bureau, Dr. Robert E. Fay, "'told the Secretary that . . . reasonable statisticians could differ'" on the question of adjustment. Pet. App. 91a. Therefore, and because we find the Secretary's two prior determinations as well to be entirely reasonable, we conclude that his decision not to adjust the 1990 census was "consonant with . . . the text and history of the Constitution." *Franklin*, 505 U. S., at 806.

III

The Constitution confers upon Congress the responsibility to conduct an "actual Enumeration" of the American public every 10 years, with the primary purpose of providing a basis for apportioning political representation among the States. Here, the Secretary of Commerce, to whom Congress has delegated its constitutional authority over the census, determined that in light of the constitutional purpose of the census, an "actual Enumeration" would best be achieved without the PES-based statistical adjustment of the results of the initial enumeration. We find that conclusion entirely reasonable. Therefore we hold that the Secretary's decision was well within the constitutional bounds of discretion over the conduct of the census provided to the Federal Government. The judgment of the Court of Appeals is

Reversed.

BARNETT BANK OF MARION COUNTY, N. A. *v.* NELSON, FLORIDA INSURANCE COMMISSIONER, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94–1837. Argued January 16, 1996—Decided March 26, 1996

A 1916 federal law (Federal Statute) permits national banks to sell insurance in small towns, but a Florida law (State Statute) prohibits such banks from selling most types of insurance. When petitioner Barnett Bank, a national bank doing business in a small Florida town, bought a state licensed insurance agency, respondent State Insurance Commissioner ordered the agency to stop selling the prohibited forms of insurance. In this action for declaratory and injunctive relief, the District Court held that the State Statute was not pre-empted, but only because of the McCarran-Ferguson Act's special insurance-related anti-pre-emption rule. That rule provides that a federal law will *not* pre-empt a state law enacted "for the purpose of regulating the business of insurance"—*unless* the federal statute "*specifically relates to the business of insurance.*" 15 U. S. C. § 1012(b) (emphasis added). The Court of Appeals affirmed.

Held: The Federal Statute pre-empts the State Statute. Pp. 30–43.

(a) Under ordinary pre-emption principles, the State Statute would be pre-empted, for it is clear that Congress, in enacting the Federal Statute, intended to exercise its constitutionally delegated authority to override contrary state law. The Federal and State Statutes are in "irreconcilable conflict," *Rice* v. *Norman Williams Co.,* 458 U. S. 654, 659, since the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids. Thus, the State's prohibition would seem to "stan[d] as an obstacle to the accomplishment" of one of the Federal Statute's purposes, *Hines* v. *Davidowitz,* 312 U. S. 52, 67, unless, as the State contends, Congress intended to limit federal permission to sell insurance to those circumstances permitted by state law. However, by providing, without relevant qualification, that national banks "may . . . act as the agent" for insurance sales, 12 U. S. C. § 92, the Federal Statute's language suggests a broad, not a limited, permission. That this authority is granted in "addition to the *powers* now vested . . . in national [banks]," *ibid.* (emphasis added), is also significant. Legislative grants of both enumerated and incidental "powers" to national banks historically have been interpreted as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law. See, *e. g., First Nat. Bank of San Jose* v. *California,* 262 U. S. 366, 368–369. Where, as here, Congress has not expressly conditioned the grant of power upon a grant of state permission, this Court has ordinarily found that no such condition applies. See *Franklin Nat. Bank of Franklin Square* v. *New York,* 347 U. S. 373. The State's argument that special circumstances surrounding the Federal Statute's enactment demonstrate Congress' intent to grant only a limited permission is unpersuasive. Pp. 30–37.

(b) The McCarran-Ferguson Act's anti-pre-emption rule does not govern this case, because the Federal Statute "specifically relates to the business of insurance." This conclusion rests upon the Act's language and purposes, taken together. The word "relates" is highly general; and in ordinary English, the Federal Statute—which focuses directly upon industry-specific selling practices and affects the relation of insured to insurer and the spreading of risk—"specifically" relates to the insurance business. The Act's mutually reinforcing purposes—that state regulation and taxation of the insurance business are in the public interest, and that Congress' "*silence* . . . shall not be construed to impose any barrier to [such] regulation or taxation," 15 U. S. C. § 1011 (emphasis added)—also support this view. This phrase, especially the word "silence," indicates that the Act seeks to protect state regulation primarily against inadvertent federal intrusion, not to insulate state insurance regulation from the reach of all federal law. The circumstances surrounding the Act's enactment also suggest that the Act was passed to ensure that generally phrased congressional statutes, which do not mention insurance, are not applied to the issuance of insurance policies, thereby interfering with state regulation in unanticipated ways. The parties' remaining arguments to the contrary are unconvincing. Pp. 37–43.

43 F. 3d 631, reversed.

BREYER, J., delivered the opinion for a unanimous Court.

Nathan Lewin argued the cause and filed briefs for petitioner. With him on the briefs were *Scott L. Nelson, James R. Heavner, Jr.,* and *Richard E. Swartley.*

Richard P. Bress argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Days, Assistant Attorney General Hunger, Deputy Solicitor General Bender, Edward C. DuMont, Anthony J. Steinmeyer, Jacob M. Lewis, Julie L.*

Williams, L. Robert Griffin, Ernest C. Barrett III, and *Joan M. Bernott.*

Daniel Y. Sumner argued the cause and filed a brief for respondents Bill Nelson et al. With him on the brief were *David J. Busch, Dennis Silverman,* and *Karen Asher-Cohen.* *Ann M. Kappler* argued the cause and filed a brief for respondents Florida Association of Life Underwriters et al. With her on the brief were *Scott A. Sinder, Sam Hirsch, Bruce J. Ennis, Jr., Paul M. Smith,* and *Donald B. Verrilli, Jr.**

JUSTICE BREYER delivered the opinion of the Court.

The question in this case is whether a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so. To answer this question, we must consider both ordinary pre-emption principles, and also a special federal anti-pre-emption rule, which provides that a federal statute will *not* pre-empt a state statute enacted "for the purpose of regulating the business of insurance"—*unless* the federal statute "*specifically relates to the business of insurance.*" McCarran-Ferguson Act, 15 U. S. C. § 1012(b) (emphasis added). We decide that the McCarran-Ferguson Act's special anti-pre-emption rule does not govern this case, because the federal statute in question "specifically relates to the business of insurance." We conclude that, under ordinary pre-emption principles, the federal statute pre-empts the state statute, thereby prohibiting application of the state statute to prevent a national bank from selling insurance in a small town.

---

*Briefs of *amici curiae* urging reversal were filed for the American Bankers Association et al. by *John J. Gill III, Michael F. Crotty, Mathew H. Street, Richard M. Whiting, Leonard J. Rubin, M. Thurman Senn,* and *David L. Glass;* for American Deposit Corp. et al. by *Thaddeus Holt* and *Dennis M. Gingold;* for the Consumer Bankers Association et al. by *David W. Roderer, Eric L. Hirschhorn, Donn C. Meindertsma, John W. Anderson,* and *Jeffrey D. Quayle;* for the Florida Bankers Association by *J. Thomas Cardwell* and *Virginia B. Townes;* and for the New York Clearing House Association by *Bruce E. Clark, Michael M. Wiseman,* and *Norman R. Nelson.*

Briefs of *amici curiae* urging affirmance were filed for the American Council of Life Insurance by *David Overlock Stewart, James M. Lichtman, Gary E. Hughes,* and *Phillip E. Stano;* for the Council of Insurance Agents and Brokers by *Mark E. Herlihy;* for the National Association of Insurance Commissioners by *Ellen Dollase Wilcox;* for the National Conference of State Legislatures et al. by *Richard Ruda, Lee Fennell,* and *Arthur E. Wilmarth, Jr.;* and for Don W. Stephens et al. by *Stephen B. Cox, Suetta W. Dickinson, Julie A. Fuselier, Richard Blumenthal,* Attorney General of Connecticut, and *John G. Haines,* Assistant Attorney General.

I

In 1916 Congress enacted a federal statute that says that certain national banks "may" sell insurance in small towns. It provides in relevant part:

> "In addition to the powers now vested by law in national [banks] organized under the laws of the United States *any such [bank]* located and doing business in any place [with a population] . . . [of not more than] five thousand . . . *may*, under such rules and regulations as may be prescribed by the Comptroller of the Currency, *act as the agent for any fire, life, or other insurance company* authorized by the authorities of the State . . . to do business [there], . . . by soliciting and selling insurance . . . Provided, however, That no such bank shall . . . guarantee the payment of any premium . . . And provided further, That the bank shall not guarantee the truth of any statement made by an assured [when applying] . . . for insurance." Act of Sept. 7, 1916 (Federal Statute), 39 Stat. 753, as amended, 12 U. S. C. § 92 (emphases changed).

In 1974 Florida enacted a statute that prohibits certain banks from selling most kinds of insurance. It says:

> "No [Florida licensed] insurance agent . . . who is associated with, . . . owned or controlled by . . . a financial institution shall engage in insurance agency activities . . . ." Fla. Stat. § 626.988(2) (Supp. 1996) (State Statute).

The term "financial institution" includes

> "any bank . . . [except for a] bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 . . . ." § 626.988(1)(a).

Thus, the State Statute says, in essence, that banks cannot sell insurance in Florida—except that an *unaffiliated* small town bank (*i. e.*, a bank that is not affiliated with a bank holding company) may sell insurance in a small town. *Ibid.*

In October 1993 petitioner Barnett Bank, an "affiliate[d]" national bank which does business through a branch in a small Florida town, bought a Florida licensed insurance agency. The Florida State Insurance Commissioner, pointing to the State Statute (and noting that the unaffiliated small town bank exception did not apply), ordered Barnett's insurance agency to stop selling the prohibited forms of insurance. Barnett, claiming that the Federal Statute pre-empted the State Statute, then filed this action for declaratory and injunctive relief in federal court.

The District Court held that the Federal Statute did not pre-empt the State Statute, but only because of the special insurance-related federal anti-pre-emption rule. The McCarran-Ferguson Act, which creates that rule, says:

> "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . ." McCarran-Ferguson Act, § 2(b), 59 Stat. 34, 15 U. S. C. § 1012(b).

The District Court decided both (1) that the Federal Statute did not fall within the McCarran-Ferguson Act's exception because it did not "specifically relat[e] to the business of insurance"; and (2) that the State Statute was a "law enacted . . . for the purpose of regulating the business of insurance." *Barnett Bank of Marion County, N. A.* v. *Gallagher,* 839 F. Supp. 835, 840–841, 843 (MD Fla. 1993) (internal quotation marks omitted). Consequently, the McCarran-Ferguson Act, in the District Court's view, instructs courts not to "constru[e]" the Federal Statute "to invalidate" the State Statute. 15 U. S. C. § 1012(b). The Eleventh Circuit Court of Appeals, for similar reasons, agreed that the Federal Statute did not pre-empt the State Statute. *Barnett Bank of Marion County, N. A.* v. *Gallagher,* 43 F. 3d 631, 634–637 (1995).

We granted certiorari due to uncertainty among lower courts about the pre-emptive effect of this Federal Statute. See *Owensboro Nat. Bank* v. *Stephens,* 44 F. 3d 388 (CA6 1994) (pre-emption of Kentucky statute that prevents national banks from selling insurance in small towns); *First Advantage Ins., Inc.* v. *Green,* 652 So. 2d 562 (La. Ct. App.), cert. and review denied, 654 So. 2d 331 (1995) (no pre-emption). We now reverse the Eleventh Circuit.

II

We shall put the McCarran-Ferguson Act's special anti-pre-emption rule to the side for the moment, and begin by asking whether, in the absence of that rule, we should construe the Federal Statute to pre-empt the State Statute. This question is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law. U. S. Const., Art. VI, cl. 2; see *California Fed. Sav. & Loan Assn.* v. *Guerra,* 479 U. S. 272, 280–281 (1987) (reviewing pre-emption doctrine).

Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. *E. g., Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525, 530–531 (1977). More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's "structure and purpose," or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. *Id.*, at 525; *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 152–153 (1982). A federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Alternatively, federal law may be in "irreconcilable conflict" with state law. *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 659 (1982). Compliance with both statutes, for example, may be a "physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963); or, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).

In this case we must ask whether or not the Federal and State Statutes are in "irreconcilable conflict." The two statutes do not impose directly conflicting duties on national banks—as they would, for example, if the federal law said, "you must sell insurance," while the state law said, "you may not." Nonetheless, the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids. Thus, the State's prohibition of those activities would seem to "stan[d] as an obstacle to the accomplishment" of one of the Federal Statute's purposes—unless, of course, that federal purpose is to grant the bank only a very *limited* permission, that is, permission to sell insurance *to the extent that state law also grants permission to do so.*

That is what the State of Florida and its supporting *amici* argue. They say that the Federal Statute grants national banks a permission that is limited to circumstances where state law is not to the contrary. In their view, the Federal Statute removes only federal legal obstacles, not state legal obstacles, to the sale of insurance by national banks. But we do not find this, or the State's related, ordinary pre-emption arguments, convincing.

For one thing, the Federal Statute's language suggests a broad, not a limited, permission. That language says, without relevant qualification, that national banks "may . . . act as the agent" for insurance sales. 12 U. S. C. § 92. It specifically refers to "rules and regulations" that will govern such sales, while citing as their source not state law, but the federal Comptroller of the Currency. *Ibid.* It also specifically refers to state regulation, while limiting that reference to licensing—not of banks or insurance agents, but of the insurance companies whose policies the bank, as insurance agent, will sell. *Ibid.*

For another thing, the Federal Statute says that its grant of authority to sell insurance is in "addition to the *powers* now vested by law in national [banks]." *Ibid.* (emphasis added). In using the word "powers," the statute chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental "powers" to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law. See, *e. g., First Nat. Bank of San Jose* v. *California,* 262 U. S. 366, 368–369 (1923) (national banks' "power" to receive deposits pre-empts contrary state escheat law); *Easton* v. *Iowa,* 188 U. S. 220, 229–230 (1903) (national banking system normally "independent, so far as powers conferred are concerned, of state legislation"); cf. *Waite* v. *Dowley,* 94 U. S. 527, 533 (1877) ("[W]here there exists a concurrent right of legislation in the States and in Congress, and the latter has exercised its power, there remains in the States no authority to legislate on the same matter").

Thus, this Court, in a case quite similar to this one, held that a federal statute permitting, but not requiring, national banks to receive savings deposits pre-empts a state statute prohibiting certain state and national banks from using the word "savings" in their advertising. *Franklin Nat. Bank of Franklin Square* v. *New York*, 347 U. S. 373, 375–379 (1954) (Federal Reserve Act provision that national banks "may continue . . . to receive . . . savings deposits" read as "declaratory of the right of a national bank to enter into or remain in that type of business"). See also *De la Cuesta, supra,* at 154–159 (federal regulation permitting, but not requiring, national banks to include in mortgage contracts a debt accelerating "due on sale" clause pre-empts a state law forbidding the use of such a clause); cf. *Lawrence County* v. *Lead-Deadwood School Dist. No. 40–1*, 469 U. S. 256 (1985) (federal statute providing that local government units "may" expend federal funds for any governmental purpose pre-empts state law restricting their expenditure).

In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers. See, *e. g.*, *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233, 247–252 (1944) (state statute administering abandoned deposit accounts did not "unlawful[ly] encroac[h] on the rights and privileges of national banks"); *McClellan* v. *Chipman*, 164 U. S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destro[y] or hampe[r]" national banks' functions); *National Bank* v. *Commonwealth*, 9 Wall. 353, 362 (1870) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government").

Nor do these cases control the interpretation of federal banking statutes that accompany a grant of an explicit power with an explicit statement that the exercise of that power is subject to state law. See, *e. g.*, 12 U. S. C. § 36(c) (McFadden Act) (authorizing national banks to operate branches, but only where state law authorizes state banks to do so); § 92a(a) (Comptroller of Currency may grant fiduciary powers "by special permit to national banks applying therefor, when not in contravention of State or local law"). Not surprisingly, this Court has interpreted those explicit provisions to mean what they say. See, *e. g.*, *First Nat. Bank in Plant City* v. *Dickinson*, 396 U. S. 122, 131 (1969) (under McFadden Act, state branching restrictions apply to national banks); *First Nat. Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U. S. 252, 260–261 (1966) (same); see also *Van Allen* v. *Assessors*, 3 Wall. 573, 586 (1866) (enforcing 1864 amendments to National Bank Act expressly authorizing state taxation of national bank shares).

But, as we pointed out, *supra*, at 32–33, where Congress has not expressly conditioned the grant of "power" upon a grant of state permission, the Court has ordinarily found that no such condition applies. In *Franklin Nat. Bank*, the Court made this point explicit. It held that Congress did not intend to subject national banks' power to local restrictions, because the federal power-granting statute there in question contained "no indication that Congress [so] intended . . . as it has done *by express language* in several other instances." 347 U. S., at 378, and n. 7 (emphasis added) (collecting examples).

The Federal Statute before us, as in *Franklin Nat. Bank*, explicitly grants a national bank an authorization, permission, or power. And, as in *Franklin Nat. Bank*, it contains no "indication" that Congress intended to subject that power to local restriction. Thus, the Court's discussion in *Franklin Nat. Bank*, the holding of that case, and the other precedent we have cited above, strongly argue for a similar interpretation here—a broad interpretation of the word "may" that does not condition federal permission upon that of the State.

Finally, Florida and its supporters challenge this interpretation by arguing that special circumstances surrounding the enactment of the Federal Statute nonetheless demonstrate Congress' intent to grant only a limited permission (subject to state approval). They point to a letter to Congress written by the Comptroller of the Currency in 1916. The Comptroller attached a draft of what became the Federal Statute, and the letter explains to Congress why the Comptroller wants Congress to enact his proposal. The letter says that, since 1900, many small town national banks had failed; that some States had authorized small town state banks to sell insurance; that providing small town national banks with authority to sell insurance would help them financially; and that doing so would also improve their competitive position vis-à-vis state banks. The relevant language in the letter (somewhat abridged) reads as follows:

> "[Since 1900, of 3,084 small national banks, 438] have either failed or gone into liquidation. . . .
> [T]here are many banks located in [small towns] . . . where the small deposits which the banks receive may make it somewhat difficult [to earn] . . . a satisfactory return . . . .
>
> "For some time I have been giving careful consideration to the question as to how the powers of these small national banks might be enlarged so as to provide them with additional sources of revenue and place them in a position where they could better compete with local State banks and trust companies which are sometimes

> authorized under the law to do a class of business not strictly that of commercial banking. . . .
>
> "[The federal banking laws, while granting national banks certain "incidental powers," do not give them] either expressly nor by necessary implication the power to act as agents for insurance companies. . . .
>
> . . . . .
>
> "My investigations lead me respectfully to recommend to Congress an amendment to the national-bank act by which national banks located in [small towns] . . . may be permitted to act as agents for insurance companies . . . .
>
> "It seems desirable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities. This additional income will strengthen them and increase their ability to make a fair return . . . .
>
> "I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers . . . .
>
> "I inclose . . . a draft . . . designed to empower national banks located in [small] towns . . . under such regulations and restrictions as may from time to time be approved and promulgated by the Comptroller of the Currency, to act as agents for the placing of insurance policies . . . ." 53 Cong. Rec. 11001 (1916) (letter from Comptroller Williams to the Chairman of the Senate Bank and Currency Committee).

Assuming for argument's sake that this letter is relevant, and in response to the arguments of Florida and its supporters, we point out that the letter does not significantly advance their cause. Although the letter mentions that enlarging the powers of small national banks will help them "better compete with local State banks," it primarily focuses upon small town national banks' need for added revenue—

an objective met by a broad insurance-selling authority that is not limited by state law. The letter refers to limitations that *federal* regulation might impose, but it says nothing about limitations imposed by *state* regulation or *state* law. The letter makes clear that authority to sell insurance in small towns is an added "incidental power" of a national bank—a term that, in light of this Court's then-existing cases, suggested freedom from conflicting state regulation. See *Easton,* 188 U. S., at 229–230; *First Nat. Bank of San Jose,* 262 U. S., at 368–369. The letter sets forth as potential objections to the proposal (or to its extension to larger national banks) concerns about distracting banking management or inhibiting the development of banking expertise—not concerns related to state regulatory control.

We have found nothing elsewhere in the Federal Statute's background or history that significantly supports the State's arguments. And as far as we are aware, the Comptroller's subsequent interpretation of the Federal Statute does not suggest that the statute provides only a limited authority subject to similar state approval. Cf. 12 CFR § 7.7100 (1995); OCC Interpretive Letter No. 366, CCH Fed. Banking L. Rep. ¶ 85,536, p. 77,833 (1986).

In light of these considerations, we conclude that the Federal Statute means to grant small town national banks authority to sell insurance, whether or not a State grants its own state banks or national banks similar approval. Were we to apply ordinary legal principles of pre-emption, the federal law would pre-empt that of the State.

III

We now must decide whether ordinary legal principles of pre-emption, or the special McCarran-Ferguson Act anti-pre-emption rule, governs this case. The lower courts held that the McCarran-Ferguson Act's special anti-pre-emption rule applies, and instructs courts not to "construe" the Federal Statute to "invalidate, impair, or supersede" that of the

State. 15 U. S. C. § 1012(b). By its terms, however, the Act does not apply when the conflicting federal statute "*specifically relates to the business of insurance.*" *Ibid.* (emphasis added). In our view, the Federal Statute in this case "specifically relates to the business of insurance"—therefore the McCarran-Ferguson Act's special anti-pre-emption rule does not apply.

Our conclusion rests upon the McCarran-Ferguson Act's language and purpose, taken together. Consider the language—"specifically relates to the business of insurance." In ordinary English, a statute that says that banks may act as insurance agents, and that the Comptroller of the Currency may regulate their insurance-related activities, "*relates*" to the insurance business. The word "relates" is highly general, and this Court has interpreted it broadly in other pre-emption contexts. See, *e. g., Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 47 (1987) (words " 'relate to' " have " 'broad common-sense meaning, such that a state law "relate[s] to" a benefit plan ". . . if it has a connection with or reference to such a plan" ' ") (quoting *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 739 (1985), in turn quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 97 (1983)); *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 383–384 (1992) (interpreting similarly the words " 'relating to' " in the Airline Deregulation Act of 1978).

More importantly, in ordinary English, this statute "*specifically*" relates to the insurance business. "Specifically" can mean "explicitly, particularly, [or] definitely," Black's Law Dictionary 1398 (6th ed. 1990), thereby contrasting a *specific* reference with an *implicit* reference made by more general language to a broader topic. The general words "business activity," for example, will sometimes include, and thereby implicitly refer, to insurance; the particular words "finance, banking, and insurance" make that reference explicitly *and specifically.*

Finally, using ordinary English, one would say that this statute specifically relates to the "*business of insurance.*" The statute explicitly grants national banks permission to "act as the agent for any fire, life, or other insurance company," to "solici[t] and sel[l] insurance," to "collec[t] premiums," and to "receive for services so rendered . . . fees or commissions," subject to Comptroller regulation. 12 U. S. C. § 92. It also sets forth certain specific rules prohibiting banks from guaranteeing the "payment of any premium on insurance policies issued through its agency . . ." and the "truth of any statement made by an assured in filing his application for insurance." *Ibid.* The statute thereby not only focuses directly upon industry-specific selling practices, but also affects the relation of insured to insurer and the spreading of risk—matters that this Court, in other contexts, has placed at the core of the McCarran-Ferguson Act's concern. See *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119, 129 (1982) (citing *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979); see also *Department of Treasury* v. *Fabe*, 508 U. S. 491, 502–504 (1993).

Consider, too, the McCarran-Ferguson Act's basic purposes. The Act sets forth two mutually reinforcing purposes in its first section, namely, that "continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "*silence* on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U. S. C. § 1011 (emphasis added). The latter phrase, particularly the word "silence," indicates that the Act does not seek to insulate state insurance regulation from the reach of all federal law. Rather, it seeks to protect state regulation primarily against *inadvertent* federal intrusion—say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part.

The circumstances surrounding enactment of the McCarran-Ferguson Act suggest the same. Just prior to the law's enactment, this Court, in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), held that a federal antitrust law, the Sherman Act, applied to the business of insurance. The Sherman Act's highly general language said nothing specifically about insurance. See 15 U. S. C. § 1 (forbidding every "contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States"). The Sherman Act applied only to activities in or affecting interstate commerce. *Hopkins* v. *United States*, 171 U. S. 578, 586 (1898). Many lawyers and insurance professionals had previously thought (relying, in part, on this Court's opinion in *Paul* v. *Virginia*, 8 Wall. 168, 183 (1869), and other cases) that the issuance of an insurance policy was not a "transaction of commerce," and therefore fell outside the Sherman Act's scope. *South-Eastern Underwriters* told those professionals that they were wrong about interstate commerce, and that the Sherman Act did apply. And *South-Eastern Underwriters'* principle meant, consequently, that other generally phrased congressional statutes might also apply to the issuance of insurance policies, thereby interfering with state regulation of insurance in similarly unanticipated ways.

In reaction to *South-Eastern Underwriters*, Congress "moved quickly," enacting the McCarran-Ferguson Act "to restore the supremacy of the States in the realm of insurance regulation." *Fabe*, *supra*, at 500. But the circumstances we have just described mean that "*restor[ation]*" of "supremacy" basically required setting aside the unanticipated effects of *South-Eastern Underwriters*, and cautiously avoiding similar unanticipated interference with state regulation in the future. It did not require avoiding federal preemption by future federal statutes that indicate, through their "specific relat[ion]" to insurance, that Congress had focused upon the insurance industry, and therefore, in all likelihood, consciously intended to exert upon the insurance industry whatever pre-emptive force accompanied its law. See also, *e. g.*, insofar as relevant, 91 Cong. Rec. 483 (1945) (statement of Sen. O'Mahoney, floor manager of the Act, that the Act was intended to be "a sort of catch-all provision to take into consideration other acts of Congress which might affect the insurance industry, but of which we did not have knowledge at the time"); *ibid.* (similar statement of Sen. Ferguson).

The language of the Federal Statute before us is not general. It refers specifically to insurance. Its state regulatory implications are not surprising, nor do we believe them inadvertent. See Part II, *supra.* Consequently, considerations of purpose, as well as of language, indicate that the Federal Statute falls within the scope of the McCarran-Ferguson Act's "specifically relates" exception to its anti-pre-emption rule. Cf. *John Hancock Mut. Life Ins. Co.* v. *Harris Trust and Sav. Bank*, 510 U. S. 86, 98 (1993) (adopting the United States' view that language in the Employee Retirement Income Security Act of 1974 defining a "guaranteed benefit policy" as a certain kind of "insurance" policy "obviously and specifically relates to the business of insurance") (internal quotation marks omitted).

We shall mention briefly why we are not convinced by several of the parties' remaining arguments. Florida says that the Federal Statute "specifically relates" to banking, not to insurance. But a statute may specifically relate to more than one thing. Just as an ordinance forbidding dogs in city parks specifically relates to dogs and to parks, so a statute permitting banks to sell insurance can specifically relate to banks and to insurance. Neither the McCarran-Ferguson Act's language, nor its purpose, requires the Federal Statute to relate *predominantly* to insurance. To the contrary, specific detailed references to the insurance industry in proposed legislation normally will achieve the McCarran-Ferguson Act's objectives, for they will call the proposed legislation to the attention of interested parties, and thereby normally guarantee, should the proposal become law, that Congress will have focused upon its insurance-related effects.

An *amicus* argues that our interpretation would give the Act "little meaning," because "whenever a state statute 'regulates' the business of insurance, any conflicting federal statute necessarily will 'specifically relate' to the insurance business." Brief for American Council of Life Insurance as *Amicus Curiae* 4. We disagree. Many federal statutes with potentially pre-emptive effect, such as the bankruptcy statutes, use general language that does not appear to "specifically relate" to insurance; and where those statutes conflict with state law that was enacted "for the purpose of regulating the business of insurance," the McCarran-Ferguson Act's anti-pre-emption rule will apply. See generally *Fabe, supra,* at 501 (noting the parties' agreement that federal bankruptcy priority rules, although conflicting with state law, do not "specifically relate" to the business of insurance).

The lower courts argued that the Federal Statute's 1916 date of enactment was significant, because Congress would have then believed that state insurance regulation was beyond its "Commerce Clause" power to affect. The lower courts apparently thought that Congress therefore could not have intended the Federal Statute to pre-empt contrary state law. The short answer to this claim is that there is no reason to think that Congress believed state insurance regulation beyond its constitutional powers to affect—insofar as Congress exercised those powers to create, to empower, or to regulate national banks. See *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819); *Farmers' and Mechanics' Nat. Bank* v. *Dearing,* 91 U. S. 29, 33 (1875); see also, *e. g., Easton* v. *Iowa,* 188 U. S., at 238. We have explained, see Part II, *supra,* why we conclude that Congress indeed *did* intend the Federal Statute to pre-empt conflicting state law.

Finally, Florida points to language in *Fabe*, which states that the McCarran-Ferguson Act "imposes what is, in effect, a clear-statement rule" that forbids pre-emption "unless a federal statute specifically requires otherwise." 508 U. S., at 507. Florida believes that this statement in *Fabe* means that the Federal Statute would have to use the words "state law is pre-empted," or the like, in order to fall within the McCarran-Ferguson Act exception. We do not believe, however, that *Fabe* imposes any such requirement. Rather, the quoted language in *Fabe* was a general description of the Act's effect. It simply pointed to the existence of the clause at issue here—the exception for federal statutes that "specifically relat[e] to the business of insurance." But it did not purport authoritatively to interpret the "specifically relates" clause. That matter was not at issue in *Fabe*. We therefore believe that *Fabe* does not require us to reach a different result here.

For these reasons, the judgment of the Court of Appeals is reversed.

It is so ordered.

SEMINOLE TRIBE OF FLORIDA *v.* FLORIDA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94–12. Argued October 11, 1995—Decided March 27, 1996

The Indian Gaming Regulatory Act, passed by Congress pursuant to the Indian Commerce Clause, allows an Indian tribe to conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. 25 U. S. C. § 2710(d)(1)(C). Under the Act, States have a duty to negotiate in good faith with a tribe toward the formation of a compact, § 2710(d)(3)(A), and a tribe may sue a State in federal court in order to compel performance of that duty, § 2710(d)(7). In this § 2710(d)(7) suit, respondents, Florida and its Governor, moved to dismiss petitioner Seminole Tribe's complaint on the ground that the suit violated Florida's sovereign immunity from suit in federal court. The District Court denied the motion, but the Court of Appeals reversed, finding that the Indian Commerce Clause did not grant Congress the power to abrogate the States' Eleventh Amendment immunity and that *Ex parte Young*, 209 U. S. 123, does not permit an Indian tribe to force good-faith negotiations by suing a State's Governor.

Held:

1. The Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against States to enforce legislation enacted pursuant to the Indian Commerce Clause. Pp. 54–73.

(a) The Eleventh Amendment presupposes that each State is a sovereign entity in our federal system and that " '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [a State's] consent.' " *Hans* v. *Louisiana*, 134 U. S. 1, 13. However, Congress may abrogate the States' sovereign immunity if it has "unequivocally expresse[d] its intent to abrogate the immunity" and has acted "pursuant to a valid exercise of power." *Green* v. *Mansour*, 474 U. S. 64, 68. Here, through the numerous references to the "State" in § 2710(d)(7)(B)'s text, Congress provided an "unmistakably clear" statement of its intent to abrogate. Pp. 54–57.

(b) The inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on a single question: Was the Act in question passed pursuant to a constitutional provision granting Congress such power? This Court has found authority to abrogate under only two constitutional provisions: the

Fourteenth Amendment, see, *e. g., Fitzpatrick* v. *Bitzer,* 427 U. S. 445, and, in a plurality opinion, the Interstate Commerce Clause, *Pennsylvania* v. *Union Gas Co.,* 491 U. S. 1. The *Union Gas* plurality found that Congress' power to abrogate came from the States' cession of their sovereignty when they gave Congress plenary power to regulate commerce. Under the rationale of *Union Gas,* the Indian Commerce Clause is indistinguishable from the Interstate Commerce Clause. Pp. 57–63.

(c) However, in the five years since it was decided, *Union Gas* has proved to be a solitary departure from established law. Reconsidering that decision, none of the policies underlying *stare decisis* require this Court's continuing adherence to its holding. The decision has been of questionable precedential value, largely because a majority of the Court expressly disagreed with the plurality's rationale. Moreover, the deeply fractured decision has created confusion among the lower courts that have sought to understand and apply it. The plurality's rationale also deviated sharply from this Court's established federalism jurisprudence and essentially eviscerated the Court's decision in *Hans,* since the plurality's conclusion—that Congress could under Article I expand the scope of the federal courts' Article III jurisdiction—contradicted the fundamental notion that Article III sets forth the exclusive catalog of permissible federal-court jurisdiction. Thus, *Union Gas* was wrongly decided and is overruled. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Pp. 63–73.

2. The doctrine of *Ex parte Young* may not be used to enforce § 2710(d)(3) against a state official. That doctrine allows a suit against a state official to go forward, notwithstanding the Eleventh Amendment's jurisdictional bar, where the suit seeks prospective injunctive relief in order to end a continuing federal-law violation. However, where, as here, Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an *Ex parte Young* action. The intricate procedures set forth in § 2710(d)(7) show that Congress intended not only to define, but also significantly to limit, the duty imposed by § 2710(d)(3). The Act mandates only a modest set of sanctions against a State, culminating in the Secretary of the Interior prescribing gaming regulations where an agreement is not reached through negotiation or mediation. In contrast, an *Ex parte Young* action would expose a state official to a federal court's full remedial powers, including, presumably, contempt sanctions. Enforcement through an *Ex parte Young* suit would also make § 2710(d)(7) super-

fluous, for it is difficult to see why a tribe would suffer through §2710(d)(7)'s intricate enforcement scheme if *Ex parte Young*'s more complete and more immediate relief were available. The Court is not free to rewrite the statutory scheme in order to approximate what it thinks Congress might have wanted had it known that §2710(d)(7) was beyond its authority. Pp. 73–76.

11 F. 3d 1016, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 76. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 100.

Bruce S. Rogow argued the cause for petitioner. With him on the briefs were *Beverly A. Pohl*, *Jerry C. Straus*, *Michael L. Roy*, *Judith A. Shapiro*, *Eugene Gressman*, and *John J. Gibbons*.

Solicitor General Days argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, *Irving L. Gornstein*, *Edward J. Shawaker*, and *Anne S. Almy*.

Jonathan A. Glogau, Assistant Attorney General of Florida, argued the cause for respondents. With him on the brief was *Robert A. Butterworth*, Attorney General.*

---

*Briefs of *amici curiae* urging reversal were filed for the Miccosukee Tribe of Indians of Florida by *Sonia Escobio O'Donnell;* for the National Indian Gaming Association et al. by *Jerome L. Levine*, *Frank R. Lawrence*, and *Kurt V. BlueDog;* for the Poarch Band of Creek Indians et al. by *William R. Perry*, *Donald J. Simon*, and *Gary Pitchlynn;* for the San Manuel Band of Mission Indians et al. by *Howard L. Dickstein*, *Jerome L. Levine*, and *Frank R. Lawrence;* for the Spokane Tribe of Indians et al. by *Michael J. Wahoske;* and for the Tohono O'Odham Nation et al. by *Eric N. Dahlstrom* and *Robert C. Brauchli.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *Manuel M. Medeiros*, Deputy Attorney General, and *Thomas F. Gede*, Special Assistant Attorney General, *Christine O. Gregoire*, Attorney General of Washington, and *Jonathan Tate McCoy*, Assistant Attorney General, joined by the Attorneys General for their respective jurisdictions as

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Indian Gaming Regulatory Act provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. 102 Stat. 2475, 25 U. S. C. § 2710(d)(1)(C). The Act, passed by Congress under the Indian Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, imposes upon the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact, § 2710(d)(3)(A), and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty, § 2710(d)(7). We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued. We further hold that the doctrine of *Ex parte Young*, 209 U. S. 123 (1908), may not be used to enforce § 2710(d)(3) against a state official.

---

follows: *Jeff Sessions* of Alabama, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Gale A. Norton* of Colorado, *Richard Blumenthal* of Connecticut, *Margery S. Bronster* of Hawaii, *Alan Lance* of Idaho, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Mike Moore* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *Drew Edmondson* of Oklahoma, *Ernest D. Preate, Jr.*, of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Mark Barnett* of South Dakota, *Dan Morales* of Texas, *Jeffrey L. Amestoy* of Vermont, *James S. Gilmore III* of Virginia, and *Darrell V. McGraw, Jr.*, of West Virginia; and for the National Governors' Association et al. by *Richard Ruda* and *Richard G. Taranto.*

Richard Dauphinais, Arlinda F. Locklear, Francis R. Skenandore, Curtis G. Berkey, and *Donald Juneau* filed a brief for the Stockbridge-Munsee Indian Community et al. as *amici curiae.*

I

Congress passed the Indian Gaming Regulatory Act in 1988 in order to provide a statutory basis for the operation and regulation of gaming by Indian tribes. See 25 U. S. C. § 2702. The Act divides gaming on Indian lands into three classes—I, II, and III—and provides a different regulatory scheme for each class. Class III gaming—the type with which we are here concerned—is defined as "all forms of gaming that are not class I gaming or class II gaming," § 2703(8), and includes such things as slot machines, casino games, banking card games, dog racing, and lotteries.[1] It is the most heavily regulated of the three classes. The Act provides that class III gaming is lawful only where it is: (1) authorized by an ordinance or resolution that (a) is adopted by the governing body of the Indian tribe, (b) satisfies certain statutorily prescribed requirements, and (c) is approved by the National Indian Gaming Commission; (2) located in a State that permits such gaming for any purpose by any person, organization, or entity; and (3) "conducted in conformance with a Tribal-State compact entered into by the

---

[1] Class I gaming "means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations," 25 U. S. C. § 2703(6), and is left by the Act to "the exclusive jurisdiction of the Indian tribes," § 2710(a)(1).

Class II gaming is more extensively defined to include bingo, games similar to bingo, nonbanking card games not illegal under the laws of the State, and card games actually operated in particular States prior to the passage of the Act. See § 2703(7). Banking card games, electronic games of chance, and slot machines are expressly excluded from the scope of class II gaming. § 2703(B). The Act allows class II gaming where the State "permits such gaming for any purpose by any person, organization or entity," and the "governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman" of the National Indian Gaming Commission. § 2710(b)(1). Regulation of class II gaming contemplates a federal role, but places primary emphasis on tribal self-regulation. See §§ 2710(c)(3)–(6).

Indian tribe and the State under paragraph (3) that is in effect." § 2710(d)(1).

The "paragraph (3)" to which the last prerequisite of § 2710(d)(1) refers is § 2710(d)(3), which describes the permissible scope of a Tribal-State compact, see § 2710(d)(3)(C), and provides that the compact is effective "only when notice of approval by the Secretary [of the Interior] of such compact has been published by the Secretary in the Federal Register," § 2710(d)(3)(B). More significant for our purposes, however, is that § 2710(d)(3) describes the process by which a State and an Indian tribe begin negotiations toward a Tribal-State compact:

> "(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact."

The State's obligation to "negotiate with the Indian tribe in good faith" is made judicially enforceable by §§ 2710(d)(7)(A)(i) and (B)(i):

> "(A) The United States district courts shall have jurisdiction over—
>
> "(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith . . . .
>
> "(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the

> Indian tribe requested the State to enter into negotiations under paragraph (3)(A)."

Sections 2710(d)(7)(B)(ii)–(vii) describe an elaborate remedial scheme designed to ensure the formation of a Tribal-State compact. A tribe that brings an action under § 2710(d)(7)(A)(i) must show that no Tribal-State compact has been entered and that the State failed to respond in good faith to the tribe's request to negotiate; at that point, the burden then shifts to the State to prove that it did in fact negotiate in good faith. § 2710(d)(7)(B)(ii). If the district court concludes that the State has failed to negotiate in good faith toward the formation of a Tribal-State compact, then it "shall order the State and Indian Tribe to conclude such a compact within a 60-day period." § 2710(d)(7)(B)(iii). If no compact has been concluded 60 days after the court's order, then "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." § 2710(d)(7)(B)(iv). The mediator chooses from between the two proposed compacts the one "which best comports with the terms of [the Act] and any other applicable Federal law and with the findings and order of the court," *ibid.*, and submits it to the State and the Indian tribe, § 2710(d)(7)(B)(v). If the State consents to the proposed compact within 60 days of its submission by the mediator, then the proposed compact is "treated as a Tribal-State compact entered into under paragraph (3)." § 2710(d)(7)(B)(vi). If, however, the State does not consent within that 60-day period, then the Act provides that the mediator "shall notify the Secretary [of the Interior]" and that the Secretary "shall prescribe . . . procedures . . . under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." § 2710(d)(7)(B)(vii).[2]

---

[2] Sections 2710(d)(7)(B)(ii)–(vii) provide in full:

"(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

In September 1991, the Seminole Tribe of Florida, petitioner, sued the State of Florida and its Governor, Lawton Chiles, respondents. Invoking jurisdiction under 25 U. S. C.

"(I) a Tribal-State compact has not been entered into under paragraph (3), and

"(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

"(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

"(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

"(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

"(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact . . . within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

"(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

"(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

"(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

[Footnote 2 is continued on p. 52]

§2710(d)(7)(A), as well as 28 U. S. C. §§1331 and 1362, petitioner alleged that respondents had "refused to enter into any negotiation for inclusion of [certain gaming activities] in a tribal-state compact," thereby violating the "requirement of good faith negotiation" contained in §2710(d)(3). Petitioner's Complaint ¶24, see App. 18. Respondents moved to dismiss the complaint, arguing that the suit violated the State's sovereign immunity from suit in federal court. The District Court denied respondents' motion, 801 F. Supp. 655 (SD Fla. 1992), and respondents took an interlocutory appeal of that decision. See *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139 (1993) (collateral order doctrine allows immediate appellate review of order denying claim of Eleventh Amendment immunity).

The Court of Appeals for the Eleventh Circuit reversed the decision of the District Court, holding that the Eleventh Amendment barred petitioner's suit against respondents.[3] 11 F. 3d 1016 (1994). The court agreed with the District Court that Congress in §2710(d)(7) intended to abrogate the States' sovereign immunity, and also agreed that the Act had been passed pursuant to Congress' power under the Indian Commerce Clause, U. S. Const., Art. I, §8, cl. 3. The court disagreed with the District Court, however, that the Indian

---

"(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

"(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction."

[3] The Eleventh Circuit consolidated petitioner's appeal with an appeal from another suit brought under §2710(d)(7)(A)(i) by a different Indian tribe. Although the District Court in that case had granted the defendants' motions to dismiss, the legal issues presented by the two appeals were virtually identical. See *Poarch Band of Creek Indians* v. *Alabama*, 776 F. Supp. 550 (SD Ala. 1991) (Eleventh Amendment bars suit against State), and 784 F. Supp. 1549 (SD Ala. 1992) (Eleventh Amendment bars suit against Governor).

Commerce Clause grants Congress the power to abrogate a State's Eleventh Amendment immunity from suit, and concluded therefore that it had no jurisdiction over petitioner's suit against Florida. The court further held that *Ex parte Young,* 209 U. S. 123 (1908), does not permit an Indian tribe to force good-faith negotiations by suing the Governor of a State. Finding that it lacked subject-matter jurisdiction, the Eleventh Circuit remanded to the District Court with directions to dismiss petitioner's suit.[4]

Petitioner sought our review of the Eleventh Circuit's decision,[5] and we granted certiorari, 513 U. S. 1125 (1995), in order to consider two questions: (1) Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause?; and (2) Does the doctrine of *Ex parte Young* permit suits against a State's Governor for prospective injunctive relief to enforce the good-faith bargaining requirement of the Act? We answer the first question in the affirmative, the second in the negative, and we therefore affirm the Eleventh Circuit's dismissal of petitioner's suit.[6]

---

[4] Following its conclusion that petitioner's suit should be dismissed, the Court of Appeals went on to consider how §2710(d)(7) would operate in the wake of its decision. The court decided that those provisions of §2710(d)(7) that were problematic could be severed from the rest of the section, and read the surviving provisions of §2710(d)(7) to provide an Indian tribe with immediate recourse to the Secretary of the Interior from the dismissal of a suit against a State. 11 F. 3d 1016, 1029 (1994).

[5] Respondents filed a cross-petition, No. 94–219, challenging only the Eleventh Circuit's modification of §2710(d)(7), see n. 4, *supra.* That petition is still pending.

[6] While the appeal was pending before the Eleventh Circuit, the District Court granted respondents' earlier filed summary judgment motion, finding that Florida had fulfilled its obligation under the Act to negotiate in good faith. The Eleventh Circuit has stayed its review of that decision pending the disposition of this case.

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford* v. *Native Village of Noatak,* 501 U. S. 775, 779 (1991). That presupposition, first observed over a century ago in *Hans* v. *Louisiana,* 134 U. S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that " '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,' " *id.,* at 13 (emphasis deleted), quoting The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton). See also *Puerto Rico Aqueduct and Sewer Authority, supra,* at 146 ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity"). For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans, supra,* at 15.[7]

---

[7] *E. g., North Carolina* v. *Temple,* 134 U. S. 22, 30 (1890); *Fitts* v. *McGhee,* 172 U. S. 516, 524 (1899); *Bell* v. *Mississippi,* 177 U. S. 693 (1900); *Smith* v. *Reeves,* 178 U. S. 436, 446 (1900); *Palmer* v. *Ohio,* 248 U. S. 32, 34 (1918); *Duhne* v. *New Jersey,* 251 U. S. 311, 313 (1920); *Ex parte New York,* 256 U. S. 490, 497 (1921); *Missouri* v. *Fiske,* 290 U. S. 18, 26 (1933); *Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47, 51 (1944); *Ford Motor Co.* v. *Department of Treasury of Ind.,* 323 U. S. 459, 464 (1945); *Georgia Railroad & Banking Co.* v. *Redwine,* 342 U. S. 299, 304, n. 13 (1952); *Parden* v. *Terminal Railway of Ala. Docks Dept.,* 377 U. S. 184, 186 (1964); *United*

Here, petitioner has sued the State of Florida and it is undisputed that Florida has not consented to the suit. See *Blatchford, supra,* at 782 (States by entering into the Constitution did not consent to suit by Indian tribes). Petitioner nevertheless contends that its suit is not barred by state sovereign immunity. First, it argues that Congress through the Act abrogated the States' sovereign immunity. Alternatively, petitioner maintains that its suit against the Governor may go forward under *Ex parte Young, supra.* We consider each of those arguments in turn.

II

Petitioner argues that Congress through the Act abrogated the States' immunity from suit. In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity," *Green* v. *Mansour,* 474 U. S. 64, 68 (1985); and second, whether Congress has acted "pursuant to a valid exercise of power," *ibid.*

A

Congress' intent to abrogate the States' immunity from suit must be obvious from "a clear legislative statement." *Blatchford, supra,* at 786. This rule arises from a recognition of the important role played by the Eleventh Amend-

---

States v. *Mississippi,* 380 U. S. 128, 140 (1965); *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.,* 411 U. S. 279, 280 (1973); *Edelman* v. *Jordan,* 415 U. S. 651, 662–663 (1974); *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976); *Cory* v. *White,* 457 U. S. 85 (1982); *Pennhurst State School and Hospital* v. *Halderman,* 465 U. S. 89, 97–100 (1984); *Atascadero State Hospital* v. *Scanlon,* 473 U. S. 234, 237–238 (1985); *Welch* v. *Texas Dept. of Highways and Public Transp.,* 483 U. S. 468, 472–474 (1987) (plurality opinion); *Dellmuth* v. *Muth,* 491 U. S. 223, 227–229, and n. 2 (1989); *Port Authority Trans-Hudson Corp.* v. *Feeney,* 495 U. S. 299, 304 (1990); *Blatchford* v. *Native Village of Noatak,* 501 U. S. 775, 779 (1991); *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.,* 506 U. S. 139, 144 (1993).

ment and the broader principles that it reflects. See *Atascadero State Hospital* v. *Scanlon,* 473 U. S. 234, 238–239 (1985); *Quern* v. *Jordan,* 440 U. S. 332, 345 (1979). In *Atascadero,* we held that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 473 U. S., at 246; see also *Blatchford, supra,* at 786, n. 4 ("The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim") (emphases deleted). Rather, as we said in *Dellmuth* v. *Muth,* 491 U. S. 223 (1989):

> "To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" *Id.,* at 227–228.

See also *Welch* v. *Texas Dept. of Highways and Public Transp.,* 483 U. S. 468, 474 (1987) (plurality opinion).

Here, we agree with the parties, with the Eleventh Circuit in the decision below, 11 F. 3d, at 1024, and with virtually every other court that has confronted the question[8] that Congress has in § 2710(d)(7) provided an "unmistakably clear" statement of its intent to abrogate. Section 2710(d)(7)(A)(i) vests jurisdiction in "[t]he United States district courts . . . over any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." Any conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe that files suit under § 2710(d)(7)(A)(i). Section 2710(d)(7)(B)(ii)(II) provides that if a suing tribe meets its burden of proof, then the "burden of proof shall be upon the State . . ."; § 2710(d)(7)(B)(iii) states that if the court "finds that the State has failed to negotiate in good faith . . . , the court shall order the State . . ."; § 2710(d)(7)(B)(iv) provides that "the State shall . . . submit to a mediator appointed by the court" and subsection (B)(v) of § 2710(d)(7) states that the mediator "shall submit to the State." Sections 2710(d)(7)(B)(vi) and (vii) also refer to the "State" in a context that makes it clear that the State is the defendant to the suit brought by an Indian tribe under § 2710(d)(7)(A)(i). In sum, we think that the numerous references to the "State" in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit.[9]

---

[8] See *Ponca Tribe of Oklahoma* v. *Oklahoma,* 37 F. 3d 1422, 1427–1428 (CA10 1994), cert. pending, No. 94–1029; *Spokane Tribe* v. *Washington,* 28 F. 3d 991, 994–995 (CA9 1994); *Cheyenne River Sioux Tribe* v. *South Dakota,* 3 F. 3d 273, 280–281 (CA8 1993); *Ponca Tribe of Oklahoma* v. *Oklahoma,* 834 F. Supp. 1341, 1345 (WD Okla. 1992); *Maxam* v. *Lower Sioux Indian Community of Minnesota,* 829 F. Supp. 277 (D. Minn. 1993); *Kickapoo Tribe of Indians* v. *Kansas,* 818 F. Supp. 1423, 1427 (D. Kan. 1993); 801 F. Supp. 655, 658 (SD Fla. 1992) (case below); *Sault Ste. Marie Tribe of Chippewa Indians* v. *Michigan,* 800 F. Supp. 1484, 1488–1489 (WD Mich. 1992); *Poarch Band of Creek Indians* v. *Alabama,* 776 F. Supp., at 557–558.

B

Having concluded that Congress clearly intended to abrogate the States' sovereign immunity through § 2710(d)(7), we turn now to consider whether the Act was passed "pursuant to a valid exercise of power." *Green* v. *Mansour,* 474 U. S., at 68. Before we address that question here, however, we think it necessary first to define the scope of our inquiry.

---

[9] JUSTICE SOUTER, in his dissenting opinion, argues that in order to avoid a constitutional question, we should interpret the Act to provide only a suit against state officials rather than a suit against the State itself. *Post,* at 182. But in light of the plain text of § 2710(d)(7)(B), we disagree with the dissent's assertion that the Act can reasonably be read in that way. "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." See *United States* v. *Locke,* 471 U. S. 84, 96 (1985), quoting *George Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 379 (1933) (Cardozo, J.). We already have found the clear statement rule satisfied, and that finding renders the preference for avoiding a constitutional question inapplicable.

Petitioner suggests that one consideration weighing in favor of finding the power to abrogate here is that the Act authorizes only prospective injunctive relief rather than retroactive monetary relief. But we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment. See, *e. g., Cory* v. *White,* 457 U. S. 85, 90 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought"). We think it follows *a fortiori* from this proposition that the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity. The Eleventh Amendment does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," *Hess* v. *Port Authority Trans-Hudson Corporation,* 513 U. S. 30, 48 (1994); it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *Puerto Rico Aqueduct and Sewer Authority,* 506 U. S., at 146 (internal quotation marks omitted).

Similarly, petitioner argues that the abrogation power is validly exercised here because the Act grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands. It is true enough that the Act extends to the States a power withheld from them by the Constitution. See *California* v. *Cabazon Band of Mission Indians,* 480 U. S. 202 (1987). Nevertheless, we do not see how that consideration is relevant to the question whether Congress may abrogate state sovereign immunity. The Eleventh Amendment immunity may not be lifted by Congress unilaterally deciding that it will be replaced by grant of some other authority. Cf. *Atascadero,* 473 U. S., at 246–247 ("[T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court").

Thus our inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate? See, *e. g., Fitzpatrick* v. *Bitzer,* 427 U. S. 445, 452–456 (1976). Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In *Fitzpatrick,* we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. *Id.,* at 455. We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." See *id.,* at 453 (internal quotation marks omitted). We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

In only one other case has congressional abrogation of the States' Eleventh Amendment immunity been upheld. In *Pennsylvania* v. *Union Gas Co.,* 491 U. S. 1 (1989), a plurality of the Court found that the Interstate Commerce Clause, Art. I, § 8, cl. 3, granted Congress the power to abrogate state sovereign immunity, stating that the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages." 491 U. S., at 19–20. Justice White added the fifth vote necessary to the result in that case, but wrote separately in order to express that he "[did] not agree with much of [the plurality's] reasoning." *Id.*, at 57 (opinion concurring in judgment in part and dissenting in part).

In arguing that Congress through the Act abrogated the States' sovereign immunity, petitioner does not challenge the Eleventh Circuit's conclusion that the Act was passed pursuant to neither the Fourteenth Amendment nor the Interstate Commerce Clause. Instead, accepting the lower court's conclusion that the Act was passed pursuant to Congress' power under the Indian Commerce Clause, petitioner now asks us to consider whether that Clause grants Congress the power to abrogate the States' sovereign immunity.

Petitioner begins with the plurality decision in *Union Gas* and contends that "[t]here is no principled basis for finding that congressional power under the Indian Commerce Clause is less than that conferred by the Interstate Commerce Clause." Brief for Petitioner 17. Noting that the *Union Gas* plurality found the power to abrogate from the "plenary" character of the grant of authority over interstate commerce, petitioner emphasizes that the Interstate Commerce Clause leaves the States with some power to regulate, see, *e. g.*, *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186 (1994), whereas the Indian Commerce Clause makes "Indian relations . . . the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226, 234 (1985). Contending that the Indian Commerce Clause vests the Federal Government with "the duty of protect[ing]" the tribes from "local ill feeling" and "the people of the States," *United States* v. *Kagama*, 118 U. S. 375, 383–384 (1886), petitioner argues that the abrogation power is necessary "to protect the tribes from state action denying federally guaranteed rights." Brief for Petitioner 20.

Respondents dispute petitioner's analogy between the Indian Commerce Clause and the Interstate Commerce Clause. They note that we have recognized that "the Interstate Commerce and Indian Commerce Clauses have very different applications," *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163, 192 (1989), and from that they argue that the two provisions are "wholly dissimilar." Brief for Respondents 21. Respondents contend that the Interstate Commerce Clause grants the power of abrogation only because Congress' authority to regulate interstate commerce would be "incomplete" without that "necessary" power. *Id.*, at 23, citing *Union Gas, supra*, at 19–20. The Indian Commerce Clause is distinguishable, respondents contend, because it gives Congress complete authority over the Indian tribes. Therefore, the abrogation power is not "necessary" to Congress' exercise of its power under the Indian Commerce Clause.[10]

Both parties make their arguments from the plurality decision in *Union Gas*, and we, too, begin there. We think it clear that Justice Brennan's opinion finds Congress' power to abrogate under the Interstate Commerce Clause from the States' cession of their sovereignty when they gave Congress plenary power to regulate interstate commerce. See *Union Gas*, 491 U. S., at 17 ("The important point . . . is that the provision both expands federal power and contracts state power"). Respondents' focus elsewhere is misplaced. While the plurality decision states that Congress' power under the Interstate Commerce Clause would be incomplete without the power to abrogate, that statement is made solely in order to emphasize the broad scope of Congress' authority over interstate commerce. *Id.*, at 19–20. Moreover, respondents' rationale would mean that where Congress has less authority, and the States have more, Congress' means for exercising that power must be greater. We read the plurality opinion to provide just the opposite. Indeed, it was in those circumstances where Congress exercised complete authority that Justice Brennan thought the power to abrogate most necessary. *Id.*, at 20 ("Since the States may not legislate at all in [the aforementioned] situations, a conclusion that Congress may not create a cause of action for money damages against the States would mean that no one could do so. And in many situations, it is only money damages that will carry out Congress' legitimate objectives under the Commerce Clause").

---

[10] Respondents also contend that the Act mandates state regulation of Indian gaming and therefore violates the Tenth Amendment by allowing federal officials to avoid political accountability for those actions for which they are in fact responsible. See *New York* v. *United States*, 505 U. S. 144 (1992). This argument was not considered below by either the Eleventh Circuit or the District Court, and is not fairly within the question presented. Therefore we do not consider it here. See this Court's Rule 14.1; *Yee* v. *Escondido*, 503 U. S. 519 (1992).

Following the rationale of the *Union Gas* plurality, our inquiry is limited to determining whether the Indian Commerce Clause, like the Interstate Commerce Clause, is a grant of authority to the Federal Government at the expense of the States. The answer to that question is obvious. If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes. Under the rationale of *Union Gas*, if the States' partial cession of authority over a particular area includes cession of the immunity from suit, then their virtually total cession of authority over a different area must also include cession of the immunity from suit. See *id.*, at 42 (SCALIA, J., joined by REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., dissenting) ("[I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers"); see *Ponca Tribe of Oklahoma* v. *Oklahoma*, 37 F. 3d 1422, 1428 (CA10 1994) (Indian Commerce Clause grants power to abrogate), cert. pending, No. 94–1029; *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F. 3d 273, 281 (CA8 1993) (same); cf. *Chavez* v. *Arte Publico*

Press, 59 F. 3d 539, 546–547 (CA5 1995) (After *Union Gas*, Copyright Clause, U. S. Const., Art. I, §8, cl. 8, must grant Congress power to abrogate). We agree with petitioner that the plurality opinion in *Union Gas* allows no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause.

Respondents argue, however, that we need not conclude that the Indian Commerce Clause grants the power to abrogate the States' sovereign immunity. Instead, they contend that if we find the rationale of the *Union Gas* plurality to extend to the Indian Commerce Clause, then "*Union Gas* should be reconsidered and overruled." Brief for Respondents 25. Generally, the principle of *stare decisis*, and the interests that it serves, viz., "the evenhanded, predictable, and consistent development of legal principles, . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process," *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991), counsel strongly against reconsideration of our precedent. Nevertheless, we always have treated *stare decisis* as a "principle of policy," *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940), and not as an "inexorable command," *Payne*, 501 U. S., at 828. "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Id.*, at 827 (quoting *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944)). Our willingness to reconsider our earlier decisions has been "particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Payne*, *supra*, at 828 (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 407 (1932) (Brandeis, J., dissenting)).

The Court in *Union Gas* reached a result without an expressed rationale agreed upon by a majority of the Court. We have already seen that Justice Brennan's opinion received the support of only three other Justices. See *Union Gas*, 491 U. S., at 5 (Marshall, Blackmun, and STEVENS, JJ., joined Justice Brennan). Of the other five, Justice White, who provided the fifth vote for the result, wrote separately in order to indicate his disagreement with the plurality's rationale, *id.*, at 57 (opinion concurring in judgment and dissenting in part), and four Justices joined together in a dissent that rejected the plurality's rationale, *id.*, at 35–45 (SCALIA, J., dissenting, joined by REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ.). Since it was issued, *Union Gas* has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision. See, *e. g.*, *Chavez* v. *Arte Publico Press*, *supra*, at 543–545 ("Justice White's concurrence must be taken on its face to disavow" the plurality's theory); 11 F. 3d, at 1027 (Justice White's "vague concurrence renders the continuing validity of *Union Gas* in doubt").

The plurality's rationale also deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in *Hans*. See *Union Gas*, *supra*, at 36 ("If *Hans* means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all") (SCALIA, J., dissenting). It was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III. The text of the Amendment itself is clear enough on this point: "The Judicial power of the United States shall not be construed to extend to any suit . . . ." And our decisions since *Hans* had been equally clear that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art. III," *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 97–98 (1984); see *Union Gas*, *supra*, at 38 ("'[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . . '") (SCALIA, J., dissenting) (quoting *Ex parte New York*, 256 U. S. 490, 497 (1921)); see also cases cited at n. 7, *supra*. As the dissent in *Union Gas* recognized, the plurality's conclusion—that Congress could under Article I expand the scope of the federal courts' jurisdiction under Article III—"contradict[ed] our unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal-court jurisdiction." *Union Gas, supra,* at 39.

Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III. *Marbury* v. *Madison,* 1 Cranch 137 (1803). The plurality's citation of prior decisions for support was based upon what we believe to be a misreading of precedent. See *Union Gas,* 491 U. S., at 40–41 (SCALIA, J., dissenting). The plurality claimed support for its decision from a case holding the unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity, see *id.*, at 14–15 (citing *Parden* v. *Terminal Railway of Ala. Docks Dept.*, 377 U. S. 184 (1964)), and cited as precedent propositions that had been merely assumed for the sake of argument in earlier cases, see 491 U. S., at 15 (citing *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S., at 475–476, and n. 5, and *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S., at 252).

The plurality's extended reliance upon our decision in *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976), that Congress could under the Fourteenth Amendment abrogate the States' sovereign immunity was also, we believe, misplaced. *Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment. *Id.*, at 454. As the dissent in *Union Gas* made clear, *Fitzpatrick* cannot be read to justify "limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution." *Union Gas, supra,* at 42 (SCALIA, J., dissenting).

In the five years since it was decided, *Union Gas* has proved to be a solitary departure from established law. See *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139 (1993). Reconsidering the decision in *Union Gas*, we conclude that none of the policies underlying *stare decisis* require our continuing adherence to its holding. The decision has, since its issuance, been of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality. See *Nichols* v. *United States*, 511 U. S. 738, 746 (1994) (the "degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision"). The case involved the interpretation of the Constitution and therefore may be altered only by constitutional amendment or revision by this Court. Finally, both the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III. We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled.

The dissent makes no effort to defend the decision in *Union Gas*, see *post*, at 100, but nonetheless would find congressional power to abrogate in this case.[11] Contending that our decision is a novel extension of the Eleventh Amendment, the dissent chides us for "attend[ing]" to dicta. We adhere in this case, however, not to mere *obiter dicta*, but rather to the well-established rationale upon which the

---

[11] Unless otherwise indicated, all references to the dissent are to the dissenting opinion authored by JUSTICE SOUTER.

Court based the results of its earlier decisions. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound. Cf. *Burnham* v. *Superior Court of Cal., County of Marin,* 495 U. S. 604, 613 (1990) (exclusive basis of a judgment is not dicta) (plurality); *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573, 668 (1989) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law") (KENNEDY, J., concurring and dissenting); *Sheet Metal Workers* v. *EEOC,* 478 U. S. 421, 490 (1986) ("Although technically dicta, . . . an important part of the Court's rationale for the result that it reache[s] . . . is entitled to greater weight . . .") (O'CONNOR, J., concurring). For over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment. In *Principality of Monaco* v. *Mississippi,* 292 U. S. 313 (1934), the Court held that the Eleventh Amendment barred a suit brought against a State by a foreign state. Chief Justice Hughes wrote for a unanimous Court:

> "[N]either the literal sweep of the words of Clause one of § 2 of Article III, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause one, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent. Thus Clause one specifically provides that the judicial Power shall extend 'to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.' But, although a case may arise under the Constitution and laws of the United States, the judicial power does not extend to it if the suit is

> sought to be prosecuted against a State, without her consent, by one of her own citizens. . . .
>
> "Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'" *Id.*, at 321–323 (citations and footnote omitted).

See *id.*, at 329–330; see also *Pennhurst*, 465 U. S., at 98 ("In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III"); *Ex parte New York*, 256 U. S., at 497 ("[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . ."). It is true that we have not had occasion previously to apply established Eleventh Amendment principles to the question whether Congress has the power to abrogate state sovereign immunity (save in *Union Gas*). But consideration of that question must proceed with fidelity to this century-old doctrine.

The dissent, to the contrary, disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events. The dissent cites not a single decision since *Hans* (other than *Union Gas*) that supports its view of state sovereign immunity, instead relying upon the now-discredited decision in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793). See, *e. g., post*, at 152, n. 47. Its undocumented and highly speculative extralegal explanation of the decision in *Hans* is a disservice to the Court's traditional method of adjudication. See *post,* at 120–123.

The dissent mischaracterizes the *Hans* opinion. That decision found its roots not solely in the common law of England, but in the much more fundamental "'jurisprudence in all civilized nations.'" *Hans,* 134 U. S., at 17, quoting *Beers* v. *Arkansas,* 20 How. 527, 529 (1858); see also The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton) (sovereign immunity "is the general sense and the general practice of mankind"). The dissent's proposition that the common law of England, where adopted by the States, was open to change by the Legislature is wholly unexceptionable and largely beside the point: that common law provided the substantive rules of law rather than jurisdiction. Cf. *Monaco, supra,* at 323 (state sovereign immunity, like the requirement that there be a "justiciable" controversy, is a constitutionally grounded limit on federal jurisdiction). It also is noteworthy that the principle of state sovereign immunity stands distinct from other principles of the common law in that only the former prompted a specific constitutional amendment.

Hans—with a much closer vantage point than the dissent—recognized that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution. The dissent's conclusion that the decision in *Chisholm* was "reasonable," *post,* at 106, certainly would have struck the Framers of the Eleventh Amendment as quite odd: That decision created "such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco, supra,* at 325. The dissent's lengthy analysis of the text of the Eleventh Amendment is directed at a straw man—we long have recognized that blind reliance upon the text of the Eleventh Amendment is "'to strain the Constitution and the law to a construction never imagined or dreamed of.'" *Monaco, supra,* at 326, quoting *Hans, supra,* at 15. The text dealt in terms only with the problem presented by the decision in *Chisholm;* in light of the fact that the federal courts did not have federal-question jurisdiction at the time the Amendment was passed (and would not have it until 1875), it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States.

That same consideration causes the dissent's criticism of the views of Marshall, Madison, and Hamilton to ring hollow. The dissent cites statements made by those three influential Framers, the most natural reading of which would preclude all federal jurisdiction over an unconsenting State.[12] Struggling against this reading, however, the dissent finds significant the absence of any contention that sovereign immunity would affect the new federal-question jurisdiction. *Post,* at 142–150. But the lack of any statute vesting general federal-question jurisdiction in the federal courts until much later makes the dissent's demand for greater specificity about a then-dormant jurisdiction overly exacting.[13]

---

[12] We note here also that the dissent quotes selectively from the Framers' statements that it references. The dissent cites the following, for instance, as a statement made by Madison: "[T]he Constitution 'give[s] a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.'" *Post,* at 143 (opinion of SOUTER, J.). But that statement, perhaps ambiguous when read in isolation, was preceded by the following: "[J]urisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal courts. It appears to me that this can have no operation but this:" See 3 J. Elliot, Debates on the Federal Constitution 533 (2d ed. 1836).

[13] Although the absence of any discussion dealing with federal-question jurisdiction is therefore unremarkable, what is notably lacking in the Framers' statements is any mention of Congress' power to abrogate the States' immunity. The absence of any discussion of that power is particularly striking in light of the fact that the Framers virtually always were very specific about the exception to state sovereign immunity arising from a State's consent to suit. See, *e. g.,* The Federalist No. 81, pp. 487–488 (C. Rossiter ed. 1961) (A. Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *with-*

In putting forward a new theory of state sovereign immunity, the dissent develops its own vision of the political system created by the Framers, concluding with the statement that "[t]he Framers' principal objectives in rejecting English theories of unitary sovereignty . . . would have been impeded if a new concept of sovereign immunity had taken its place in federal-question cases, and would have been substantially thwarted if that new immunity had been held untouchable by any congressional effort to abrogate it."[14] *Post,* at 157. This sweeping statement ignores the fact that the Nation survived for nearly two centuries without the question of the existence of such power ever being presented to this Court. And Congress itself waited nearly a century before even conferring federal-question jurisdiction on the lower federal courts.[15]

---

out its consent. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal") (emphasis in the original); 3 Elliot, *supra,* at 533 (J. Madison) ("It is not in the power of individuals to call any state into court. . . . [The Constitution] can have no operation but this: . . . if a state should condescend to be a party, this court may take cognizance of it").

[14] This argument wholly disregards other methods of ensuring the States' compliance with federal law: The Federal Government can bring suit in federal court against a State, see, *e. g., United States* v. *Texas,* 143 U. S. 621, 644–645 (1892) (finding such power necessary to the "permanence of the Union"); an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law, see, *e. g., Ex parte Young,* 209 U. S. 123 (1908); and this Court is empowered to review a question of federal law arising from a state-court decision where a State has consented to suit, see, *e. g., Cohens* v. *Virginia,* 6 Wheat. 264 (1821).

[15] JUSTICE STEVENS, in his dissenting opinion, makes two points that merit separate response. First, he contends that no distinction may be drawn between state sovereign immunity and the immunity enjoyed by state and federal officials. But even assuming that the latter has no constitutional foundation, the distinction is clear: The Constitution specifically recognizes the States as sovereign entities, while government officials enjoy no such constitutional recognition. Second, JUSTICE STEVENS criti-

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.[16] The Eleventh Amendment restricts the

---

cizes our prior decisions applying the "clear statement rule," suggesting that they were based upon an understanding that Article I allowed Congress to abrogate state sovereign immunity. His criticism, however, ignores the fact that many of those cases arose in the context of a statute passed under the Fourteenth Amendment, where Congress' authority to abrogate is undisputed. See, *e. g., Quern* v. *Jordan,* 440 U. S. 332 (1979). And a more fundamental flaw of the criticism is its failure to recognize that both the doctrine requiring avoidance of constitutional questions, and principles of federalism, require us always to apply the clear statement rule before we consider the constitutional question whether Congress has the power to abrogate.

[16] JUSTICE STEVENS understands our opinion to prohibit federal jurisdiction over suits to enforce the bankruptcy, copyright, and antitrust laws against the States. He notes that federal jurisdiction over those statutory schemes is exclusive, and therefore concludes that there is "no remedy" for state violations of those federal statutes. *Post,* at 78, n. 1.

That conclusion is exaggerated both in its substance and in its significance. First, JUSTICE STEVENS' statement is misleadingly overbroad. We have already seen that several avenues remain open for ensuring state compliance with federal law. See n. 14, *supra.* Most notably, an individual may obtain injunctive relief under *Ex parte Young* in order to remedy a state officer's ongoing violation of federal law. See n. 14, *supra.* Second, contrary to the implication of JUSTICE STEVENS' conclusion, it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes; in the decision of this Court that JUSTICE STEVENS cites (and somehow labels "incompatible" with our decision here), we specifically reserved the question whether the Eleventh Amendment would allow a suit to enforce the antitrust laws against a State. See *Goldfarb* v. *Virginia State Bar,* 421 judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.

III

Petitioner argues that we may exercise jurisdiction over its suit to enforce § 2710(d)(3) against the Governor notwithstanding the jurisdictional bar of the Eleventh Amendment. Petitioner notes that since our decision in *Ex parte Young,* 209 U. S. 123 (1908), we often have found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to "end a continuing violation of federal law." *Green* v. *Mansour,* 474 U. S., at 68. The situation presented here, however, is sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine.

Here, the "continuing violation of federal law" alleged by petitioner is the Governor's failure to bring the State into compliance with § 2710(d)(3). But the duty to negotiate imposed upon the State by that statutory provision does not stand alone. Rather, as we have seen, *supra,* at 49–50, Congress passed § 2710(d)(3) in conjunction with the care-

---

U. S. 773, 792, n. 22 (1975). Although the copyright and bankruptcy laws have existed practically since our Nation's inception, and the antitrust laws have been in force for over a century, there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States. Notably, both Court of Appeals decisions cited by JUSTICE STEVENS were issued last year and were based upon *Union Gas.* See *Chavez* v. *Arte Publico Press,* 59 F. 3d 539 (CA5 1995); *Matter of Merchants Grain, Inc.* v. *Mahern,* 59 F. 3d 630 (CA7 1995). Indeed, while the Court of Appeals in *Chavez* allowed the suit against the State to go forward, it expressly recognized that its holding was unprecedented. See *Chavez,* 59 F. 3d, at 546 ("[W]e are aware of no case that specifically holds that laws passed pursuant to the Copyright Clause can abrogate State immunity").

fully crafted and intricate remedial scheme set forth in § 2710(d)(7).

Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary. *Schweiker* v. *Chilicky*, 487 U. S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies"). Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: Therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.

Here, Congress intended § 2710(d)(3) to be enforced against the State in an action brought under § 2710(d)(7); the intricate procedures set forth in that provision show that Congress intended therein not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3). For example, where the court finds that the State has failed to negotiate in good faith, the only remedy prescribed is an order directing the State and the Indian tribe to conclude a compact within 60 days. And if the parties disregard the court's order and fail to conclude a compact within the 60-day period, the only sanction is that each party then must submit a proposed compact to a mediator who selects the one which best embodies the terms of the Act. Finally, if the State fails to accept the compact selected by the mediator, the only sanction against it is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations governing class III gaming on the tribal lands at issue. By contrast with this quite modest set of sanctions, an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court, including, presumably, contempt sanctions. If § 2710(d)(3) could be enforced in a suit under *Ex parte Young,* § 2710(d)(7) would have been superfluous; it is difficult to see why an Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under *Ex parte Young.*[17]

Here, of course, we have found that Congress does not have authority under the Constitution to make the State suable in federal court under § 2710(d)(7). Nevertheless, the fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under § 2710(d)(3). Nor are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that § 2710(d)(7) was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts. We hold that *Ex parte Young* is inapplicable to petitioner's suit against the Governor of Florida, and therefore that suit is barred by the Eleventh Amendment and must be dismissed for a lack of jurisdiction.

---

[17] Contrary to the claims of the dissent, we do not hold that Congress *cannot* authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme. We find only that Congress did not intend that result in the Indian Gaming Regulatory Act. Although one might argue that the text of § 2710(d)(7)(A)(i), taken alone, is broad enough to encompass both a suit against a State (under an abrogation theory) and a suit against a state official (under an *Ex parte Young* theory), subsection (A)(i) of § 2710(d)(7) cannot be read in isolation from subsections (B)(ii)–(vii), which repeatedly refer exclusively to "the State." See *supra,* at 56–57. In this regard, § 2710(d)(7) stands in contrast to the statutes cited by the dissent as examples where lower courts have found that Congress implicitly authorized suit under *Ex parte Young.* Compare 28 U. S. C. § 2254(e) (federal court authorized to issue an "order directed to an appropriate State official"); 42 U. S. C. § 11001 (1988 ed.) (requiring "the Governor" of a State to perform certain actions and holding "the Governor" responsible for nonperformance); 33 U. S. C. § 1365(a) (authorizing a suit against "any person" who is alleged to be in violation of relevant water pollution laws). Similarly the duty imposed by the Act—to "negotiate . . . in good faith to enter into" a compact with another sovereign—stands distinct in that it is not of the sort likely to be performed by an individual state executive officer or even a group of officers. Cf. *State ex rel. Stephan* v. *Finney,* 836 P. 2d 1169, 251 Kan. 559 (1992) (Governor of Kansas may negotiate but may not enter into compact without grant of power from legislature).

IV

The Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court. The narrow exception to the Eleventh Amendment provided by the *Ex parte Young* doctrine cannot be used to enforce § 2710(d)(3) because Congress enacted a remedial scheme, § 2710(d)(7), specifically designed for the enforcement of that right. The Eleventh Circuit's dismissal of petitioner's suit is hereby affirmed.[18]

It is so ordered.

JUSTICE STEVENS, dissenting.

This case is about power—the power of the Congress of the United States to create a private federal cause of action against a State, or its Governor, for the violation of a federal right. In *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), the entire Court—including Justice Iredell whose dissent provided the blueprint for the Eleventh Amendment—assumed that Congress had such power. In *Hans* v. *Louisiana*, 134 U. S. 1 (1890)—a case the Court purports to follow today—the Court again assumed that Congress had such power. In *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976), and *Pennsylvania* v. *Union Gas Co.,* 491 U. S. 1, 24 (1989) (STEVENS, J., concurring), the Court squarely held that Congress has such power. In a series of cases beginning with *Atascadero State Hospital* v. *Scanlon,* 473 U. S. 234, 238–239 (1985), the Court formulated a special "clear statement rule" to determine whether specific Acts of Congress contained an effective exercise of that power. Nevertheless, in a sharp break with the past, today the Court holds that with the narrow and illogical exception of statutes enacted pursuant to the Enforcement Clause of the Fourteenth Amendment, Congress has no such power.

---

[18] We do not here consider, and express no opinion upon, that portion of the decision below that provides a substitute remedy for a tribe bringing suit. See 11 F. 3d, at 1029.

The importance of the majority's decision to overrule the Court's holding in *Pennsylvania* v. *Union Gas Co.* cannot be overstated. The majority's opinion does not simply preclude Congress from establishing the rather curious statutory scheme under which Indian tribes may seek the aid of a federal court to secure a State's good-faith negotiations over gaming regulations. Rather, it prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.[1]

---

[1] See, *e. g., Pennsylvania* v. *Union Gas Co.,* 491 U. S. 1 (1989) (holding that a federal court may order a State to pay cleanup costs pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980); *In re Merchants Grain, Inc.,* 59 F. 3d 630 (CA7 1995) (holding that the Eleventh Amendment does not bar a bankruptcy court from issuing a money judgment against a State under the Bankruptcy Code); *Chavez* v. *Arte Publico Press,* 59 F. 3d 539 (CA5 1995) (holding that a state university could be sued in federal court for infringing an author's copyright). The conclusion that suits against States may not be brought in federal court is also incompatible with our cases concluding that state entities may be sued for antitrust violations. See, *e. g., Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 791–792 (1975).

As federal courts have exclusive jurisdiction over cases arising under these federal laws, the majority's conclusion that the Eleventh Amend-

There may be room for debate over whether, in light of the Eleventh Amendment, Congress has the power to ensure that such a cause of action may be enforced in federal court by a citizen of another State or a foreign citizen. There can be no serious debate, however, over whether Congress has the power to ensure that such a cause of action may be brought by a citizen of the State being sued. Congress' authority in that regard is clear.

As JUSTICE SOUTER has convincingly demonstrated, the Court's contrary conclusion is profoundly misguided. Despite the thoroughness of his analysis, supported by sound reason, history, precedent, and strikingly uniform scholarly commentary, the shocking character of the majority's affront to a coequal branch of our Government merits additional comment.

I

For the purpose of deciding this case, I can readily assume that Justice Iredell's dissent in *Chisholm* v. *Georgia*, 2 Dall., at 429–450, and the Court's opinion in *Hans* v. *Louisiana*, 134 U. S. 1 (1890), correctly stated the law that should govern our decision today. As I shall explain, both of those opinions relied on an interpretation of an Act of Congress rather than a want of congressional power to authorize a suit against the State.

In concluding that the federal courts could not entertain Chisholm's action against the State of Georgia, Justice Iredell relied on the text of the Judiciary Act of 1789, not the State's assertion that Article III did not extend the judicial power to suits against unconsenting States. Justice Iredell argued that, under Article III, federal courts possessed only

---

ment shields States from being sued under them in federal court suggests that persons harmed by state violations of federal copyright, bankruptcy, and antitrust laws have no remedy. See Harris & Kenny, Eleventh Amendment Jurisprudence After *Atascadero:* The Coming Clash With Antitrust, Copyright, and Other Causes of Action Over Which the Federal Courts Have Exclusive Jurisdiction, 37 Emory L. J. 645 (1988).

such jurisdiction as Congress had provided, and that the Judiciary Act expressly limited federal-court jurisdiction to that which could be exercised in accordance with "'the principles and usages of law.'" *Chisholm* v. *Georgia,* 2 Dall., at 434 (quoting § 14 of the Judiciary Act of 1789). He reasoned that the inclusion of this phrase constituted a command to the federal courts to construe their jurisdiction in light of the prevailing common law, a background legal regime that he believed incorporated the doctrine of sovereign immunity. *Chisholm* v. *Georgia,* 2 Dall., at 434–436 (dissenting opinion).[2]

Because Justice Iredell believed that the expansive text of Article III did not prevent Congress from imposing this common-law limitation on federal-court jurisdiction, he concluded that judges had no authority to entertain a suit against an unconsenting State.[3] At the same time, although he acknowledged that the Constitution might allow Congress to extend federal-court jurisdiction to such an action, he concluded that the terms of the Judiciary Act of 1789 plainly had not done so.

> "[Congress'] direction, I apprehend, we cannot supersede, because it may appear to us not sufficiently extensive. *If it be not, we must wait till other remedies are provided by the same authority.* From this it is plain that the Legislature did not chuse to leave to our own

---

[2] Because Justice Iredell read the Judiciary Act of 1789 to have incorporated the common law, he did not even conclude that Congress would have to make a clear statement in order to override the common law's recognition of sovereign immunity.

[3] Actually, he limited his conclusion to the narrower question whether an action of assumpsit would lie against a State, which he distinguished from the more general question whether a State can ever be sued. *Chisholm* v. *Georgia,* 2 Dall. 419, 430 (1793). He did so because he recognized "that in *England,* certain judicial proceedings not inconsistent with the sovereignty, may take place against the Crown, but that an action of *assumpsit* will not lie," and because he had "often found a great deal of confusion to arise from taking too large a view at once." *Ibid.*

> discretion the path to justice, but has prescribed one of its own. In doing so, it has, I think, wisely, referred us to principles and usages of law already well known, and by their precision calculated to guard against that innovating spirit of Courts of Justice, which the Attorney-General in another case reprobated with so much warmth, and with whose sentiments in that particular, I most cordially join." *Id.*, at 434 (emphasis added).

For Justice Iredell then, it was enough to assume that Article III *permitted* Congress to impose sovereign immunity as a jurisdictional limitation; he did not proceed to resolve the further question whether the Constitution went so far as to *prevent* Congress from withdrawing a State's immunity.[4] Thus, it would be ironic to construe the *Chisholm* dissent as precedent for the conclusion that Article III limits Congress' power to determine the scope of a State's sovereign immunity in federal court.

The precise holding in *Chisholm* is difficult to state because each of the Justices in the majority wrote his own opinion. They seem to have held, however, not that the Judiciary Act of 1789 precluded the defense of sovereign immunity, but that Article III of the Constitution itself required the Supreme Court to entertain original actions against unconsenting States.[5] I agree with Justice Iredell that such a construction of Article III is incorrect; that Article should not then have been construed, and should not now be construed, to prevent Congress from granting States a sovereign immunity defense in such cases.[6] That reading of Article III, however, explains why the majority's holding in *Chisholm* could not have been reversed by a simple statutory amendment adopting Justice Iredell's interpretation of the Judiciary Act of 1789. There is a special irony in the fact that the error committed by the *Chisholm* majority was its decision that this Court, rather than Congress, should define the scope of the sovereign immunity defense. That, of course, is precisely the same error the Court commits today.

---

[4] In two sentences at the end of his lengthy opinion, Justice Iredell stated that his then-present view was that the Constitution would not permit a "compulsive suit against a State for the recovery of money." *Id.*, at 449. In light of Justice Iredell's express statement that the only question before the Court was the propriety of an individual's action for assumpsit against a State, an action which, of course, results in a money judgment, see n. 2, *supra*, this dicta should not be understood to state the general view that the Constitution bars *all* suits against unconsenting States. Moreover, even as to the limited question whether the Constitution permits actions for money judgments, Justice Iredell took pains to reserve ultimate judgment. *Chisholm* v. *Georgia*, 2 Dall., at 449. Thus, nothing in Justice Iredell's two sentences of dicta provides a basis for concluding that Congress lacks the power to authorize the suit for the nonmonetary relief at issue here.

In light of the nature of the disagreement between Justice Iredell and his colleagues, *Chisholm*'s holding could have been overturned by simply amending the Constitution to restore to Congress the authority to recognize the doctrine. As it was, the plain text of the Eleventh Amendment would seem to go further and to limit the judicial power itself in a certain class of cases. In doing so, however, the Amendment's quite explicit text establishes only a partial bar to a federal court's power to entertain a suit against a State.[7]

---

[5] In this respect, *Chisholm* v. *Georgia* should be understood to be of a piece with the debate over judicial power famously joined in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 337 (1816). There, too, the argument centered on whether Congress had the power to limit the seemingly expansive jurisdictional grant that Article III had conferred, not on whether Article III itself provided the relevant limitation.

[6] The contention that Article III withdrew Georgia's sovereign immunity had special force precisely because *Chisholm* involved an action premised on the Supreme Court's original jurisdiction. While Article III leaves it to Congress to establish the lower federal courts, and to make exceptions to the Supreme Court's appellate jurisdiction, it specifically mandates that there be a Supreme Court and that it shall be vested with original jurisdiction over those actions in which "a State shall be Party." Art. III, § 2. In light of that language, the *Chisholm* majority's conclusion that the Supreme Court had a constitutional obligation to take jurisdiction of all suits against States was not implausible.

Justice Brennan has persuasively explained that the Eleventh Amendment's jurisdictional restriction is best understood to apply only to suits premised on diversity jurisdiction, see *Atascadero State Hospital* v. *Scanlon,* 473 U. S., at 247 (dissenting opinion), and JUSTICE SCALIA has agreed that the plain text of the Amendment cannot be read to apply to federal-question cases. See *Pennsylvania* v. *Union Gas,* 491 U. S., at 31 (dissenting opinion).[8] Whatever the precise dimensions of the Amendment, its express terms plainly do *not* apply to all suits brought against unconsenting States.[9]

---

[7] It should be remembered that at the time of *Chisholm,* there was a general fear of what Justice Iredell termed the "innovating spirit" of the Federal Judiciary. See, *e. g.,* 3 A. Beveridge, The Life of John Marshall 19–30 (1919) (discussing the consternation that the federal courts' creation of common-law felonies engendered). Thus, there is good reason to believe that the reaction to *Chisholm* reflected the popular hostility to the Federal Judiciary more than any desire to restrain the National Legislature.

[8] Of course, even if the Eleventh Amendment applies to federal-question cases brought by a citizen of another State, its express terms pose no bar to a federal court assuming jurisdiction in a federal-question case brought by an in-state plaintiff pursuant to Congress' express authorization. As that is precisely the posture of the suit before us, and as it was also precisely the posture of the suit at issue in *Pennsylvania* v. *Union Gas,* there is no need to decide here whether Congress would be barred from authorizing out-of-state plaintiffs to enforce federal rights against States in federal court. In fact, Justice Brennan left open that question in his dissent in *Atascadero State Hospital* v. *Scanlon,* 473 U. S. 234, 288, n. 41 (1985). "When the Court is prepared to embark on a defensible interpretation of the Eleventh Amendment consistent with its history and purposes, the question whether the Amendment bars federal-question or admiralty suits by a noncitizen or alien against a State would be open." *Ibid.*

[9] Under the "plain text" of the Eleventh Amendment, I note that there would appear to be no more basis for the conclusion that States may consent to federal-court jurisdiction in actions brought by out-of-state or foreign citizens than there would be for the view that States should be permitted to consent to the jurisdiction of a federal court in a case that poses no federal question. See, *e. g., Owen Equipment & Erection Co.* v.

The question thus becomes whether the relatively modest jurisdictional bar that the Eleventh Amendment imposes should be understood to reveal that a more general jurisdictional bar implicitly inheres in Article III.

The language of Article III certainly gives no indication that such an implicit bar exists. That provision's text specifically provides for federal-court jurisdiction over *all* cases arising under federal law. Moreover, as I have explained, Justice Iredell's dissent argued that it was the Judiciary Act of 1789, not Article III, that prevented the federal courts from entertaining Chisholm's diversity action against Georgia. Therefore, Justice Iredell's analysis at least suggests that it was by no means a fixed view at the time of the founding that Article III prevented Congress from rendering States suable in federal court by their own citizens. In sum, little more than speculation justifies the conclusion that the Eleventh Amendment's express but partial limitation on the scope of Article III reveals that an implicit but more general one was already in place.

II

The majority appears to acknowledge that one cannot deduce from either the text of Article III or the plain terms of

---

Kroger, 437 U. S. 365, 377, n. 21 (1978); *Sosna* v. *Iowa*, 419 U. S. 393, 398 (1975); *California* v. *LaRue*, 409 U. S. 109, 112–113, n. 3 (1972); *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6, 17–18, and n. 17 (1951); *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934); *Jackson* v. *Ashton*, 8 Pet. 148, 149 (1834). We have, however, construed the Amendment, despite its text, to apply only to unconsenting States. See, *e. g.*, *Clark* v. *Barnard*, 108 U. S. 436, 447 (1883). In so doing, we of course left it for Congress to determine whether federal courts should entertain any claim against a State in federal court. A departure from the text to expand the class of plaintiffs to whom the Eleventh Amendment's bar applies would, however, limit Congress' authority to exercise its considered judgment as to the propriety of federal-court jurisdiction. The absence of a textual warrant for imposing such a broad limitation on the legislative branch counsels against this Court extratextually imposing one.

the Eleventh Amendment that the judicial power does not extend to a congressionally created cause of action against a State brought by one of that State's citizens. Nevertheless, the majority asserts that precedent compels that same conclusion. I disagree. The majority relies first on our decision in *Hans* v. *Louisiana,* 134 U. S. 1 (1890), which involved a suit by a citizen of Louisiana against that State for a claimed violation of the Contracts Clause. The majority suggests that by dismissing the suit, *Hans* effectively held that federal courts have no power to hear federal-question suits brought by same-state plaintiffs.

Hans does not hold, however, that the Eleventh Amendment, or any other constitutional provision, precludes federal courts from entertaining actions brought by citizens against their own States in the face of contrary congressional direction. As I have explained before, see *Pennsylvania* v. *Union Gas Co.,* 491 U. S., at 25–26 (STEVENS, J., concurring), and as JUSTICE SOUTER effectively demonstrates, *Hans* instead reflects, at the most, this Court's conclusion that, as a matter of federal common law, federal courts should decline to entertain suits against unconsenting States. Because *Hans* did not announce a constitutionally mandated jurisdictional bar, one need not overrule *Hans,* or even question its reasoning, in order to conclude that Congress may direct the federal courts to reject sovereign immunity in those suits not mentioned by the Eleventh Amendment. Instead, one need only follow it.

Justice Bradley's somewhat cryptic opinion for the Court in *Hans* relied expressly on the reasoning of Justice Iredell's dissent in *Chisholm,* which, of course, was premised on the view that the doctrine of state sovereign immunity was a common-law rule that Congress had directed federal courts to respect, not a constitutional immunity that Congress was powerless to displace. For that reason, Justice Bradley explained that the State's immunity from suit by one of its own citizens was based not on a constitutional rule but rather on the fact that Congress had not, by legislation, attempted to overcome the common-law presumption of sovereign immunity. His analysis so clearly supports the position rejected by the majority today that it is worth quoting at length.

> "But besides the presumption that no anomalous and unheard of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the Constitution was adopted—an additional reason why the jurisdiction claimed for the Circuit Court does not exist, is the language of the act of Congress by which its jurisdiction is conferred. The words are these: 'The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties,' etc.—'Concurrent with the courts of the several States.' Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The state courts have no power to entertain suits by individuals against a State without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power? It is true that the same qualification existed in the judiciary act of 1789, which was before the court in *Chisholm* v. *Georgia,* and the majority of the court did not think that it was sufficient to limit the jurisdiction of the Circuit Court. Justice Iredell thought differently. In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views in this regard." *Hans* v. *Louisiana,* 134 U. S., at 18–19.

As this passage demonstrates, *Hans* itself looked to see whether Congress had displaced the presumption that sovereign immunity obtains. Although the opinion did go to great lengths to establish the quite uncontroversial historical proposition that unconsenting States generally were not subject to suit, that entire discussion preceded the opinion's statutory analysis. See *id.*, at 10–18. Thus, the opinion's thorough historical investigation served only to establish a presumption against jurisdiction that Congress must overcome, not an inviolable jurisdictional restriction that inheres in the Constitution itself.

Indeed, the very fact that the Court characterized the doctrine of sovereign immunity as a "presumption" confirms its assumption that it could be displaced. The *Hans* Court's inquiry into congressional intent would have been wholly inappropriate if it had believed that the doctrine of sovereign immunity was a constitutionally inviolable jurisdictional limitation. Thus, *Hans* provides no basis for the majority's conclusion that Congress is powerless to make States suable in cases not mentioned by the text of the Eleventh Amendment. Instead, *Hans* provides affirmative support for the view that Congress may create federal-court jurisdiction over private causes of action against unconsenting States brought by their own citizens.

It is true that the underlying jurisdictional statute involved in this case, 28 U. S. C. § 1331, does not itself purport to direct federal courts to ignore a State's sovereign immunity any more than did the underlying jurisdictional statute discussed in *Hans*, the Judiciary Act of 1875. However, unlike in *Hans*, in this case Congress has, by virtue of the Indian Gaming Regulatory Act, affirmatively manifested its intention to "invest its courts with" jurisdiction beyond the limits set forth in the general jurisdictional statute. 134 U. S., at 18. By contrast, because *Hans* involved only an implied cause of action based directly on the Constitution, the Judiciary Act of 1875 constituted the sole indication as to whether Congress intended federal-court jurisdiction to extend to a suit against an unconsenting State.[10]

Given the nature of the cause of action involved in *Hans*, as well as the terms of the underlying jurisdictional statute, the Court's decision to apply the common-law doctrine of sovereign immunity in that case clearly should not control the outcome here. The reasons that may support a federal court's hesitancy to construe a judicially crafted constitutional remedy narrowly out of respect for a State's sovereignty do not bear on whether Congress may preclude a State's invocation of such a defense when it expressly establishes a federal remedy for the violation of a federal right.

No one has ever suggested that Congress would be powerless to displace the other common-law immunity doctrines that this Court has recognized as appropriate defenses to certain federal claims such as the judicially fashioned remedy in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403

---

[10] In his dissent in *Pennsylvania* v. *Union Gas Co.*, 491 U. S., at 36–37, JUSTICE SCALIA contended that the existence of the Judiciary Act of 1875 at the time of *Hans* requires one to accept the "gossamer distinction between cases in which Congress has assertedly sought to eliminate state sovereign immunity pursuant to its powers to create and organize courts, and cases in which it has assertedly sought to do so pursuant to some of its other powers," in order to conclude that, in spite of *Hans*, Congress may authorize federal courts to hear a suit against an unconsenting State. I rely on no such "gossamer distinction" here.

Congress has the authority to withdraw sovereign immunity in cases not covered by the Eleventh Amendment under *all* of its various powers. Nothing in *Hans* is to the contrary. As the passage quoted above demonstrates, *Hans* merely concluded that Congress, in enacting the Judiciary Act of 1875, did not manifest a desire to withdraw state sovereign immunity with sufficient clarity to overcome the countervailing presumption. Therefore, I rely only on the distinction between a statute that clearly directs federal courts to entertain suits against States, such as the one before us here, and a statute that does not, such as the Judiciary Act of 1875. In light of our repeated application of a clear-statement rule in Eleventh Amendment cases, from *Hans* onward, I would be surprised to learn that such a distinction is too thin to be acceptable.

U. S. 388 (1971). See *Mitchell* v. *Forsyth,* 472 U. S. 511 (1985); *Harlow* v. *Fitzgerald,* 457 U. S. 800 (1982). Similarly, our cases recognizing qualified officer immunity in 42 U. S. C. § 1983 actions rest on the conclusion that, in passing that statute, Congress did not intend to displace the common-law immunity that officers would have retained under suits premised solely on the general jurisdictional statute. See *Tower* v. *Glover,* 467 U. S. 914, 920 (1984). For that reason, the federal common law of officer immunity that Congress meant to incorporate, not a contrary state immunity, applies in § 1983 cases. See *Martinez* v. *California,* 444 U. S. 277, 284 (1980). There is no reason why Congress' undoubted power to displace those common-law immunities should be either greater or lesser than its power to displace the common-law sovereign immunity defense.

Some of our precedents do state that the sovereign immunity doctrine rests on fundamental constitutional "postulates" and partakes of jurisdictional aspects rooted in Article III. See *ante,* at 67–70. Most notably, that reasoning underlies this Court's holding in *Principality of Monaco* v. *Mississippi,* 292 U. S. 313 (1934).

Monaco is a most inapt precedent for the majority's holding today. That case barred a foreign sovereign from suing a State in an equitable state-law action to recover payments due on state bonds. It did not, however, involve a claim based on federal law. Instead, the case concerned a purely state-law question to which the State had interposed a federal defense. *Id.,* at 317. Thus, *Monaco* reveals little about the power of Congress to create a private federal cause of action to remedy a State's violation of federal law.

Moreover, although *Monaco* attributes a quasi-constitutional status to sovereign immunity, even in cases not covered by the Eleventh Amendment's plain text, that characterization does not constitute precedent for the proposition that Congress is powerless to displace a State's immunity. Our abstention doctrines have roots in both the Tenth Amendment and Article III, and thus may be said to rest on constitutional "postulates" or to partake of jurisdictional aspects. Yet it has not been thought that the Constitution would prohibit Congress from barring federal courts from abstaining. The majority offers no reason for making the federal common-law rule of sovereign immunity less susceptible to congressional displacement than any other quasi-jurisdictional common-law rule.

In this regard, I note that *Monaco* itself analogized sovereign immunity to the prudential doctrine that "controversies" identified in Article III must be "justiciable" in order to be heard by federal courts. *Id.*, at 329. The justiciability doctrine is a prudential rather than a jurisdictional one, and thus Congress' clearly expressed intention to create federal jurisdiction over a particular Article III controversy necessarily strips federal courts of the authority to decline jurisdiction on justiciability grounds. See *Allen* v. *Wright*, 468 U. S. 737, 791 (1984) (STEVENS, J., dissenting); *Flast* v. *Cohen*, 392 U. S. 83, 100–101 (1968). For that reason, *Monaco*, by its own terms, fails to resolve the question before us.[11]

More generally, it is quite startling to learn that the *reasoning* of *Hans* and *Monaco* (even assuming that it did not undermine the majority's view) should have a *stare decisis* effect on the question whether Congress possesses the authority to provide a federal forum for the vindication of a federal right by a citizen against its own State. In light of the Court's development of a "clear-statement" line of jurisprudence, see, *e. g., Atascadero State Hospital* v. *Scanlon,* 473 U. S., at 238–239; *Hoffman* v. *Connecticut Dept. of Income Maintenance,* 492 U. S. 96 (1989), I would have thought that *Hans* and *Monaco* had at least left open the question whether Congress could permit the suit we consider here. Our clear-statement cases would have been all but unintelligible if *Hans* and *Monaco* had already established that Congress lacked the constitutional power to make States suable in federal court by individuals no matter how clear its intention to do so.[12]

---

[11] Indeed, to the extent the reasoning of *Monaco* was premised on the ground that a contrary ruling might permit foreign governments and States indirectly to frustrate Congress' treaty power, 292 U. S., at 331, the opinion suggests that its outcome would have been quite different had Congress expressly authorized suits by foreign governments against individual States as part of its administration of foreign policy.

Finally, the particular nature of the federal question involved in *Hans* renders the majority's reliance upon its rule even less defensible. *Hans* deduced its rebuttable presumption in favor of sovereign immunity largely on the basis of its extensive analysis of cases holding that the sovereign could not be forced to make good on its debts via a private suit. See *Louisiana* v. *Jumel,* 107 U. S. 711 (1883); *Hagood* v. *Southern,* 117 U. S. 52 (1886); *In re Ayers,* 123 U. S. 443 (1887). Because *Hans,* like these other cases, involved a suit that attempted to make a State honor its debt, its holding need not be read to stand even for the relatively limited proposition that there is a *presumption* in favor of sovereign immunity in all federal-question cases.[13]

---

[12] Moreover, they would have most unnecessarily burdened Congress. For example, after deciding that Congress had not made sufficiently explicit its intention to withdraw the state sovereign immunity defense in certain bankruptcy actions, see *Hoffman* v. *Connecticut Dept. of Income Maintenance,* 392 U. S. 96 (1989), Congress understandably concluded that it could correct the confusion by amending the relevant statute to make its intentions to override such a defense unmistakably clear. See *In re Merchants Grain, Inc.,* 59 F. 3d 630 (CA7 1995). Congress will no doubt be surprised to learn that its exercise in legislative clarification, which it undertook for our benefit, was for naught because the Constitution makes it so.

[13] Significantly, Chief Justice Marshall understood the Eleventh Amendment's bar to have been designed primarily to protect States from being sued for their debts. See *Cohens* v. *Virginia,* 6 Wheat. 264, 406 (1821).

In *Hans*, the plaintiff asserted a Contracts Clause claim against his State and thus asserted a federal right. To show that Louisiana had impaired its federal obligation, however, Hans first had to demonstrate that the State had entered into an enforceable contract as a matter of state law. That Hans chose to bring his claim in federal court as a Contract Clause action could not change the fact that he was, at bottom, seeking to enforce a contract with the State. See Burnham, Taming the Eleventh Amendment Without Overruling *Hans* v. *Louisiana*, 40 Case W. Res. L. Rev. 931 (1990).

Because Hans' claimed federal right did not arise independently of state law, sovereign immunity was relevant to the threshold state-law question of whether a valid contract existed.[14] *Hans* expressly pointed out, however, that an individual who could show that he had an *enforceable* contract under state law would not be barred from bringing suit in federal court to prevent the State from impairing it.

> "To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subject of judicial cognizance unless the State consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be

---

[14] Significantly, many of the cases decided after *Hans* in which this Court has recognized state sovereign immunity involved claims premised on the breach of rights that were rooted in state law. See *Ford Motor Co.* v. *Department of Treasury of Ind.*, 323 U. S. 459 (1945); *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47 (1944); *Smith* v. *Reeves*, 178 U. S. 436 (1900). In such cases, the Court's application of the state-law immunity appears simply to foreshadow (or follow) the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), not to demark the limits of Article III.

> judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment." *Hans* v. *Louisiana*, 134 U. S., at 20–21.

That conclusion casts doubt on the absolutist view that *Hans* definitively establishes that Article III prohibits federal courts from entertaining federal-question suits brought against States by their own citizens. At the very least, *Hans* suggests that such suits may be brought to enjoin States from impairing existing contractual obligations.

The view that the rule of *Hans* is more substantive than jurisdictional comports with Hamilton's famous discussion of sovereign immunity in The Federalist Papers. Hamilton offered his view that the federal judicial power would not extend to suits against unconsenting States only in the context of his contention that no contract with a State could be enforceable against the State's desire. He did not argue that a State's immunity from suit in federal court would be absolute.

> "[T]here is no color to pretend that the State governments would, by the adoption of [the plan of convention], be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will." The Federalist No. 81, p. 488 (C. Rossiter ed. 1961).

Here, of course, no question of a State's contractual obligations is presented. The Seminole Tribe's only claim is that the State of Florida has failed to fulfill a duty to negotiate that federal statutory law alone imposes. Neither the Federalist Papers, nor *Hans*, provides support for the view that such a claim may not be heard in federal court.

III

In reaching my conclusion that the Constitution does not prevent Congress from making the State of Florida suable in federal court for violating one of its statutes, I emphasize that I agree with the majority that in all cases to which the judicial power does not extend—either because they are not within any category defined in Article III or because they are within the category withdrawn from Article III by the Eleventh Amendment—Congress lacks the power to confer jurisdiction on the federal courts. As I have previously insisted: "A statute cannot amend the Constitution." *Pennsylvania* v. *Union Gas Co.*, 491 U. S., at 24.

It was, therefore, misleading for the Court in *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), to imply that § 5 of the Fourteenth Amendment authorized Congress to confer jurisdiction over cases that had been withdrawn from Article III by the Eleventh Amendment. Because that action had been brought by Connecticut citizens against officials of the State of Connecticut, jurisdiction was not precluded by the Eleventh Amendment. As Justice Brennan pointed out in his concurrence, the congressional authority to enact the provisions at issue in the case was found in the Commerce Clause and provided a sufficient basis for refusing to allow the State to "avail itself of the nonconstitutional but ancient doctrine of sovereign immunity." *Id.*, at 457 (opinion concurring in judgment).

In confronting the question whether a federal grant of jurisdiction is within the scope of Article III, as limited by the Eleventh Amendment, I see no reason to distinguish among statutes enacted pursuant to the power granted to Congress to regulate commerce among the several States, and with the Indian tribes, Art. I, § 8, cl. 3, the power to establish uniform laws on the subject of bankruptcy, Art. I, § 8, cl. 4, the power to promote the progress of science and the arts by granting exclusive rights to authors and inventors, Art. I, § 8, cl. 8, the power to enforce the provisions of the Fourteenth Amendment, § 5, or indeed any other provision of the Constitution. There is no language anywhere in the constitutional text that authorizes Congress to expand the borders of Article III jurisdiction or to limit the coverage of the Eleventh Amendment.

The Court's *holdings* in *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), and *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 (1989), do unquestionably establish, however, that Congress has the power to deny the States and their officials the right to rely on the nonconstitutional defense of sovereign immunity in an action brought by one of their own citizens. As the opinions in the latter case demonstrate, there can be legitimate disagreement about whether Congress intended a particular statute to authorize litigation against a State. Nevertheless, the Court there squarely held that the Commerce Clause was an adequate source of authority for such a private remedy. In a rather novel rejection of the doctrine of *stare decisis*, the Court today demeans that holding by repeatedly describing it as a "plurality decision" because Justice White did not deem it necessary to set forth the reasons for his vote. As JUSTICE SOUTER's opinion today demonstrates, the arguments in support of Justice White's position are so patent and so powerful that his actual vote should be accorded full respect. Indeed, far more significant than the "plurality" character of the three opinions supporting the holding in *Union Gas* is the fact that the issue confronted today has been squarely addressed by a total of 13 Justices, 8 of whom cast their votes with the so-called "plurality."[15]

---

[15] It is significant that JUSTICE SOUTER's opinion makes it perfectly clear that JUSTICE GINSBURG, JUSTICE BREYER, and he did not consider it necessary to rely on the holding in *Union Gas* to support their conclu-

The fundamental error that continues to lead the Court astray is its failure to acknowledge that its modern embodiment of the ancient doctrine of sovereign immunity "has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment." *Id.*, at 25 (STEVENS, J., concurring). It rests rather on concerns of federalism and comity that merit respect but are nevertheless, in cases such as the one before us, subordinate to the plenary power of Congress.

IV

As I noted above, for the purpose of deciding this case, it is not necessary to question the wisdom of the Court's decision in *Hans* v. *Louisiana.* Given the absence of precedent for the Court's dramatic application of the sovereign immunity doctrine today, it is nevertheless appropriate to identify the questionable heritage of the doctrine and to suggest that there are valid reasons for limiting, or even rejecting that doctrine altogether, rather than expanding it.

Except insofar as it has been incorporated into the text of the Eleventh Amendment, the doctrine is entirely the product of judge-made law. Three features of its English ancestry make it particularly unsuitable for incorporation into the law of this democratic Nation.

First, the assumption that it could be supported by a belief that "the King can do no wrong" has always been absurd; the bloody path trod by English monarchs both before and after they reached the throne demonstrated the fictional character of any such assumption. Even if the fiction had been acceptable in Britain, the recitation in the Declaration of Independence of the wrongs committed by George III made that proposition unacceptable on this side of the Atlantic.

---

sion. I find today's decision particularly unfortunate because of its failure to advance an acceptable reason for refusing to adhere to a precedent upon which the Congress, as well as the courts, should be entitled to rely.

Second, centuries ago the belief that the monarch served by divine right made it appropriate to assume that redress for wrongs committed by the sovereign should be the exclusive province of still higher authority.[16] While such a justification for a rule that immunized the sovereign from suit in a secular tribunal might have been acceptable in a jurisdiction where a particular faith is endorsed by the government, it should give rise to skepticism concerning the legitimacy of comparable rules in a society where a constitutional wall separates the State from the Church.

Third, in a society where noble birth can justify preferential treatment, it might have been unseemly to allow a commoner to hale the monarch into court. Justice Wilson explained how foreign such a justification is to this Nation's principles. See *Chisholm* v. *Georgia,* 2 Dall., at 455. Moreover, Chief Justice Marshall early on laid to rest the view that the purpose of the Eleventh Amendment was to protect a State's dignity. *Cohens* v. *Virginia,* 6 Wheat. 264, 406–407 (1821). Its purpose, he explained, was far more practical.

> "That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. . . . We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the juris-

---

[16] See Stevens, Is Justice Irrelevant?, 87 Nw. U. L. Rev. 1121, 1124–1125 (1993).

> diction of the Court in those cases, because it might be essential to the preservation of peace." *Ibid.*[17]

Nevertheless, this Court later put forth the interest in preventing "indignity" as the "very object and purpose of the [Eleventh] Amendment." *In re Ayers*, 123 U. S., at 505. That, of course, is an "embarrassingly insufficient" rationale for the rule. See *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 151 (1993) (STEVENS, J., dissenting).

Moreover, I find unsatisfying Justice Holmes' explanation that "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353 (1907). As I have explained before, Justice Holmes' justification fails in at least two respects.

> "First, it is nothing more than a restatement of the obvious proposition that a citizen may not sue the sovereign unless the sovereign has violated the citizen's legal rights. It cannot explain application of the immunity defense in cases like *Chisholm*, in which it is assumed that the plaintiff's rights have in fact been violated—and those cases are, of course, the only ones in which the immunity defense is needed. Second, Holmes's statement does not purport to explain why a general grant of jurisdiction to federal courts should not be treated as an adequate expression of the sovereign's consent to suits against itself as well as to suits against

---

[17] Interestingly, this passage demonstrates that the Court's application of a common-law sovereign immunity defense in *Principality of Monaco* v. *Mississippi*, 292 U. S. 313 (1934), was quite probably justified. There a foreign state sued a State as a substantial creditor, and thus implicated the very purpose of the Eleventh Amendment.

> ordinary litigants." Stevens, Is Justice Irrelevant?, 87 Nw. U. L. Rev. 1121, 1126 (1993).

In sum, as far as its common-law ancestry is concerned, there is no better reason for the rule of sovereign immunity "than that so it was laid down in the time of Henry IV." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). That "reason" for the perpetuation of this ancient doctrine certainly cannot justify the majority's expansion of it.

In this country the sovereignty of the individual States is subordinate both to the citizenry of each State and to the supreme law of the federal sovereign. For that reason, Justice Holmes' explanation for a rule that allows a State to avoid suit in its own courts does not even speak to the question whether Congress should be able to authorize a federal court to provide a private remedy for a State's violation of federal law. In my view, neither the majority's opinion today, nor any earlier opinion by any Member of the Court, has identified any acceptable reason for concluding that the absence of a State's consent to be sued in federal court should affect the power of Congress to authorize federal courts to remedy violations of federal law by States or their officials in actions not covered by the Eleventh Amendment's explicit text.[18]

While I am persuaded that there is no justification for permanently enshrining the judge-made law of sovereign immunity, I recognize that federalism concerns—and even the interest in protecting the solvency of the States that was at work in *Chisholm* and *Hans*—may well justify a grant of immunity from federal litigation in certain classes of cases. Such a grant, however, should be the product of a reasoned decision by the policymaking branch of our Government. For this Court to conclude that timeworn shibboleths iterated and reiterated by judges should take precedence over the deliberations of the Congress of the United States is simply irresponsible.

---

[18] Because *Hans* v. *Louisiana*, 134 U. S. 1 (1890), was the first case in which the Court held that a State could not be sued in federal court by one of its citizens, this comment is of interest:

"It is not necessary that we should enter upon an examination of the reason or the expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence." *Id.*, at 21.

So it is today.

V

Fortunately, and somewhat fortuitously, a jurisdictional problem that is unmentioned by the Court may deprive its opinion of precedential significance. The Indian Gaming Regulatory Act establishes a unique set of procedures for resolving the dispute between the Tribe and the State. If each adversary adamantly adheres to its understanding of the law, if the District Court determines that the State's inflexibility constitutes a failure to negotiate in good faith, and if the State thereafter continues to insist that it is acting within its rights, the maximum sanction that the Court can impose is an order that refers the controversy to a member of the Executive Branch of the Government for resolution. 25 U. S. C. § 2710(d)(7)(B). As the Court of Appeals interpreted the Act, this final disposition is available even though the action against the State and its Governor may not be maintained. 11 F. 3d 1016, 1029 (CA11 1994). (The Court does not tell us whether it agrees or disagrees with that disposition.) In my judgment, it is extremely doubtful that the obviously dispensable involvement of the judiciary in the intermediate stages of a procedure that begins and ends in the Executive Branch is a proper exercise of judicial power. See *Gordon* v. *United States*, 117 U. S. Appx. 697, 702–703 (1864) (opinion of Taney, C. J.); *United States* v. *Ferreira*, 13 How. 40, 48 (1852). It may well follow that the misguided opinion of today's majority has nothing more than an advisory character. Whether or not that be so, the better reasoning in JUSTICE SOUTER's far wiser and far more scholarly opinion will surely be the law one day.

For these reasons, as well as those set forth in JUSTICE SOUTER's opinion, I respectfully dissent.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

In holding the State of Florida immune to suit under the Indian Gaming Regulatory Act, the Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right. Although the Court invokes the Eleventh Amendment as authority for this proposition, the only sense in which that amendment might be claimed as pertinent here was tolerantly phrased by JUSTICE STEVENS in his concurring opinion in *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 23 (1989). There, he explained how it has come about that we have two Eleventh Amendments, the one ratified in 1795, the other (so-called) invented by the Court nearly a century later in *Hans* v. *Louisiana*, 134 U. S. 1 (1890). JUSTICE STEVENS saw in that second Eleventh Amendment no bar to the exercise of congressional authority under the Commerce Clause in providing for suits on a federal question by individuals against a State, and I can only say that after my own canvass of the matter I believe he was entirely correct in that view, for reasons given below. His position, of course, was also the holding in *Union Gas*, which the Court now overrules and repudiates.

The fault I find with the majority today is not in its decision to reexamine *Union Gas*, for the Court in that case produced no majority for a single rationale supporting congressional authority. Instead, I part company from the Court because I am convinced that its decision is fundamentally mistaken, and for that reason I respectfully dissent.

I

It is useful to separate three questions: (1) whether the States enjoyed sovereign immunity if sued in their own courts in the period prior to ratification of the National Constitution; (2) if so, whether after ratification the States were entitled to claim some such immunity when sued in a federal court exercising jurisdiction either because the suit was between a State and a nonstate litigant who was not its citizen, or because the issue in the case raised a federal question; and (3) whether any state sovereign immunity recognized in federal court may be abrogated by Congress.

The answer to the first question is not clear, although some of the Framers assumed that States did enjoy immunity in their own courts. The second question was not debated at the time of ratification, except as to citizen-state diversity jurisdiction;[1] there was no unanimity, but in due course the Court in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), answered that a state defendant enjoyed no such immunity. As to federal-question jurisdiction, state sovereign immunity seems not to have been debated prior to ratification, the silence probably showing a general understanding at the time that the States would have no immunity in such cases.

The adoption of the Eleventh Amendment soon changed the result in *Chisholm*, not by mentioning sovereign immunity, but by eliminating citizen-state diversity jurisdiction over cases with state defendants. I will explain why the

---

[1] The two Citizen-State Diversity Clauses provide as follows: "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U. S. Const., Art. III, §2. In his opinion in *Union Gas*, JUSTICE STEVENS referred to these Clauses as the "citizen-state" and "alien-state" Clauses, respectively, *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 24 (1989) (concurring opinion). I have grouped the two as "Citizen-State Diversity Clauses" for ease in frequent repetition here.

Eleventh Amendment did not affect federal-question jurisdiction, a notion that needs to be understood for the light it casts on the soundness of *Hans*'s holding that States did enjoy sovereign immunity in federal-question suits. The *Hans* Court erroneously assumed that a State could plead sovereign immunity against a noncitizen suing under federal-question jurisdiction, and for that reason held that a State must enjoy the same protection in a suit by one of its citizens. The error of *Hans*'s reasoning is underscored by its clear inconsistency with the Founders' hostility to the implicit reception of common-law doctrine as federal law, and with the Founders' conception of sovereign power as divided between the States and the National Government for the sake of very practical objectives.

The Court's answer today to the third question is likewise at odds with the Founders' view that common law, when it was received into the new American legal system, was always subject to legislative amendment. In ignoring the reasons for this pervasive understanding at the time of the ratification, and in holding that a nontextual common-law rule limits a clear grant of congressional power under Article I, the Court follows a course that has brought it to grief before in our history, and promises to do so again.

Beyond this third question that elicits today's holding, there is one further issue. To reach the Court's result, it must not only hold the *Hans* doctrine to be outside the reach of Congress, but must also displace the doctrine of *Ex parte Young*, 209 U. S. 123 (1908), that an officer of the government may be ordered prospectively to follow federal law, in cases in which the government may not itself be sued directly. None of its reasons for displacing *Young*'s jurisdictional doctrine withstand scrutiny.

A

The doctrine of sovereign immunity comprises two distinct rules, which are not always separately recognized. The one rule holds that the King or the Crown, as the font of law, is not bound by the law's provisions; the other provides that the King or Crown, as the font of justice, is not subject to suit in its own courts. See, *e. g.*, Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 3–4 (1963).[2] The one rule limits the reach of substantive law; the other, the jurisdiction of the courts. We are concerned here only with the latter rule, which took its common-law form in the high Middle Ages. "At least as early as the thirteenth century, during the reign of Henry III (1216–1272), it was recognized that the king could not be sued in his own courts." C. Jacobs, Eleventh Amendment and Sovereign Immunity 5 (1972). See also 3 W. Blackstone, Commentaries *244–*245; Jaffe, *supra*, at 2 ("By the time of Bracton (1268) it was settled doctrine that the King could not be sued *eo nomine* in his own courts").

The significance of this doctrine in the nascent American law is less clear, however, than its early development and steady endurance in England might suggest. While some colonial governments may have enjoyed some such immunity, Jacobs, *supra*, at 6–7, the scope (and even the existence) of this governmental immunity in pre-Revolutionary America remains disputed. See Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1895–1899 (1983).

---

[2] The first of these notions rests on the ancient maxim that "the King can do no wrong." See, *e. g.*, 1 W. Blackstone, Commentaries *244. Professor Jaffe has argued this expression "originally meant precisely the contrary to what it later came to mean," that is, "'it meant that the king must not, was not allowed, not entitled, to do wrong.'" Jaffe, 77 Harv. L. Rev., at 4 (quoting L. Ehrlich, Proceedings Against the Crown (1216–1377), p. 42, in 6 Oxford Studies in Social and Legal History (P. Vinogradoff ed. 1921), p. 42); see also 1 Blackstone, *supra*, at *246 (interpreting the maxim to mean that "the prerogative of the crown extends not to do any injury"). In any event, it is clear that the idea of the sovereign, or any part of it, being above the law in this sense has not survived in American law. See, *e. g.*, *Langford* v. *United States*, 101 U. S. 341, 342–343 (1880); *Nevada* v. *Hall*, 440 U. S. 410, 415 (1979).

Whatever the scope of sovereign immunity might have been in the Colonies, however, or during the period of Confederation, the proposal to establish a National Government under the Constitution drafted in 1787 presented a prospect unknown to the common law prior to the American experience: the States would become parts of a system in which sovereignty over even domestic matters would be divided or parcelled out between the States and the Nation, the latter to be invested with its own judicial power and the right to prevail against the States whenever their respective substantive laws might be in conflict. With this prospect in mind, the 1787 Constitution might have addressed state sovereign immunity by eliminating whatever sovereign immunity the States previously had, as to any matter subject to federal law or jurisdiction; by recognizing an analogue to the old immunity in the new context of federal jurisdiction, but subject to abrogation as to any matter within that jurisdiction; or by enshrining a doctrine of inviolable state sovereign immunity in the text, thereby giving it constitutional protection in the new federal jurisdiction. See Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515, 536–538 (1977).

The 1787 draft in fact said nothing on the subject, and it was this very silence that occasioned some, though apparently not widespread, dispute among the Framers and others over whether ratification of the Constitution would preclude a State sued in federal court from asserting sovereign immunity as it could have done on any matter of nonfederal law litigated in its own courts. As it has come down to us, the discussion gave no attention to congressional power under the proposed Article I but focused entirely on the limits of the judicial power provided in Article III. And although the jurisdictional bases together constituting the judicial power of the national courts under § 2 of Article III included questions arising under federal law and cases between States and individuals who are not citizens,[3] it was only upon the latter citizen-state diversity provisions that preratification questions about state immunity from suit or liability centered.[4]

Later in my discussion I will canvass the details of the debate among the Framers and other leaders of the time, see *infra*, at 142–150; for now it is enough to say that there was no consensus on the issue. See *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 263–280 (1985) (Brennan, J., dissenting); *Nevada* v. *Hall*, 440 U. S. 410, 419 (1979); Jacobs, *supra*, at 40 ("[T]he legislative history of the Constitution hardly warrants the conclusion drawn by some that there was a general understanding, at the time of ratification, that the states would retain their sovereign immunity"). There was, on the contrary, a clear disagreement, which was left to fester during the ratification period, to be resolved only thereafter. One other point, however, was also clear: the debate addressed only the question whether ratification of the Constitution would, in diversity cases and without more, abrogate the state sovereign immunity or allow it to have some application. We have no record that anyone argued for the third option mentioned above, that the Constitution would affirmatively guarantee state sovereign immunity against any congressional action to the contrary. Nor would there have been any apparent justification for any such argument, since no clause in the proposed (and ratified) Constitution even so much as suggested such a position. It may have been reasonable to contend (as we will see that Madison, Marshall, and Hamilton did) that Article III would not alter States' pre-existing common-law immunity despite its unqualified grant of jurisdiction over diversity suits against States. But then, as now, there was no textual support for contending that Article III or any other provision would "constitutionalize" state sovereign immunity, and no one uttered any such contention.

---

[3] The text reads that "[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[4] The one statement I have found on the subject of States' immunity in federal-question cases was an opinion that immunity would not be applicable in these cases: James Wilson, in the Pennsylvania ratification debate, stated that the federal-question clause would require States to make good on pre-Revolutionary debt owed to English merchants (the enforcement of which was promised in the Treaty of 1783) and thereby "show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may." 2 J. Elliot, Debates on the Federal Constitution 490 (2d ed. 1836) (Elliot's Debates).

B

The argument among the Framers and their friends about sovereign immunity in federal citizen-state diversity cases, in any event, was short lived and ended when this Court, in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), chose between the constitutional alternatives of abrogation and recognition of the immunity enjoyed at common law. The 4-to-1 majority adopted the reasonable (although not compelled) interpretation that the first of the two Citizen-State Diversity Clauses abrogated for purposes of federal jurisdiction any immunity the States might have enjoyed in their own courts, and Georgia was accordingly held subject to the judicial power in a common-law assumpsit action by a South Carolina citizen suing to collect a debt.[5] The case also settled, by implication, any question there could possibly have been about recognizing state sovereign immunity in actions depending on the federal question (or "arising under") head of jurisdiction

---

[5] This lengthy discussion of the history of the Constitution's ratification, the Court's opinion in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), and the adoption of the Eleventh Amendment is necessary to explain why, in my view, the contentions in some of our earlier opinions that *Chisholm* cre-

---

ated a great "shock of surprise" misread the history. See *Principality of Monaco* v. *Mississippi*, 292 U. S. 313 (1934). The Court's response to this historical analysis is simply to recite yet again *Monaco*'s erroneous assertion that *Chisholm* created "such a shock of surprise that the Eleventh Amendment was at once proposed and adopted," 292 U. S., at 325. See *ante*, at 69. This response is, with respect, no response at all.

Monaco's *ipse dixit* that *Chisholm* created a "shock of surprise" does not make it so. This Court's opinions frequently make assertions of historical fact, but those assertions are not authoritative as to history in the same way that our interpretations of laws are authoritative as to them. In *Tucker* v. *Alexandroff*, 183 U. S. 424, 434 (1902), which was, like *Monaco*, decided a century after the event it purported to recount, the Court baldly stated that "in September 1790, General Washington, on the advice of Mr. Adams, did refuse to permit British troops to march through the territory of the United States from Detroit to the Mississippi, apparently for the reason that the object of such movement was an attack on New Orleans and the Spanish possessions on the Mississippi." Modern historians agree, however, that there was no such request, see J. Daly, The Use of History in the Decisions of the Supreme Court: 1900–1930, pp. 65–66 (1954); W. Manning, The Nootka Sound Controversy, in Annual Report of the American Historical Association, H. R. Doc. No. 429, 58th Cong., 3d Sess., pp. 415–423 (1905), and it would of course be absurd for this Court to treat the fact that *Tucker* asserted the existence of the request as proof that it actually occurred. Cf. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 72–73 (1938) ("But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to [the Judiciary Act of 1789] by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written").

Moreover, in this case, there is ample evidence contradicting the "shock of surprise" thesis. Contrary to *Monaco*'s suggestion, the Eleventh Amendment was not "at once proposed and adopted." Congress was in session when *Chisholm* was decided, and a constitutional amendment in response was proposed two days later, but Congress never acted on it, and in fact it was not until two years after *Chisholm* was handed down that as well. The constitutional text on federal-question jurisdiction, after all, was just as devoid of immunity language as it was on citizen-state diversity, and at the time of *Chisholm* any influence that general common-law immunity might have had as an interpretive force in construing constitutional language would presumably have been no greater when addressing the federal-question language of Article III than its Diversity Clauses. See Sherry, The Eleventh Amendment and Stare Decisis: Overruling *Hans v Louisiana,* 57 U. Chi. L. Rev. 1260, 1270 (1990).

Although Justice Iredell's dissent in *Chisholm* seems at times to reserve judgment on what I have called the third question, whether Congress could authorize suits against the States, *Chisholm, supra,* at 434–435, his argument is largely devoted to stating the position taken by several federalists that state sovereign immunity was cognizable under the Citizen-State Diversity Clauses, not that state immunity was somehow invisibly codified as an independent constitutional defense. As JUSTICE STEVENS persuasively explains in greater detail, *ante,* at 78–81, Justice Iredell's dissent focused on the construction of the Judiciary Act of 1789, not Article III. See also Orth, The Truth About Justice Iredell's Dissent in *Chisholm v. Georgia* (1793), 73 N. C. L. Rev. 255 (1994). This would have been an odd focus, had he believed that Congress lacked the constitutional authority to impose liability. Instead, on Justice Iredell's view, States sued in diversity retained the common-law sovereignty "where no special act of Legislation controuls it, to be in force in each State, as it existed in England, (unaltered by any statute) at the time of the first settlement of the country." 2 Dall., at 435 (emphasis deleted). While in at least some circumstances States might be held liable to "the authority of the United States," *id.,* at 436, any such liability

---

an Amendment was ratified. See Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1926–1927 (1983).

would depend upon "laws passed under the Constitution and in conformity to it," *ibid.*[6] Finding no congressional action abrogating Georgia's common-law immunity, Justice Iredell concluded that the State should not be liable to suit.[7]

C

The Eleventh Amendment, of course, repudiated *Chisholm* and clearly divested federal courts of some jurisdiction as to cases against state parties:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

There are two plausible readings of this provision's text. Under the first, it simply repeals the Citizen-State Diversity

---

[6] See also 2 Dall., at 435 ("[I]t is certain that in regard to any common law principle which can influence the question before us no alteration has been made by any statute"); *id.*, at 437 (if "no new remedy be provided . . . we have no other rule to govern us but the principles of the preexistent laws, which must remain in force till superseded by others"); *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 283 (1985) (Brennan, J., dissenting). But see Justice Iredell's dicta suggesting that the Constitution would not permit suits against a State. *Chisholm*, *supra*, at 449 (dissenting opinion); *Atascadero*, *supra*, at 283, n. 34 (Brennan, J., dissenting).

[7] Of course, even if Justice Iredell had concluded that state sovereign immunity was not subject to abrogation, it would be inappropriate to assume (as it appears the Court does today, and *Hans* v. *Louisiana*, 134 U. S. 1 (1890), did as well) that the Eleventh Amendment (regardless of what it says) "constitutionalized" Justice Iredell's dissent, or that it simply adopted the opposite of the holding in *Chisholm*. It is as odd to read the Eleventh Amendment's rejection of *Chisholm* (which held that States may be sued in diversity) to say that States may not be sued on a federal question as it would be to read the Twenty-Sixth Amendment's rejection of *Oregon* v. *Mitchell*, 400 U. S. 112 (1970) (which held that Congress could not require States to extend the suffrage to 18-year-olds) to permit Congress to require States to extend the suffrage to 12-year-olds.

Clauses of Article III for all cases in which the State appears as a defendant. Under the second, it strips the federal courts of jurisdiction in any case in which a state defendant is sued by a citizen not its own, even if jurisdiction might otherwise rest on the existence of a federal question in the suit. Neither reading of the Amendment, of course, furnishes authority for the Court's view in today's case, but we need to choose between the competing readings for the light that will be shed on the *Hans* doctrine and the legitimacy of inflating that doctrine to the point of constitutional immutability as the Court has chosen to do.

The history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses.[8] In precisely tracking the language in Article III providing for citizen-state diversity jurisdiction, the text of the Amendment does, after all, suggest to common sense that only the Diversity Clauses are being addressed. If the Framers had meant the Amendment to bar federal-question suits as well, they could not only have made their intentions clearer very easily, but could simply have adopted the first post-*Chisholm* proposal, introduced in the House of Representatives by Theodore Sedgwick of Massachusetts on instructions from the Legislature of that Commonwealth. Its provisions would have had exactly that expansive effect:

---

[8] The great weight of scholarly commentary agrees. See, *e. g.*, Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L. J. 1 (1988); Amar, Of Sovereignty and Federalism, 96 Yale L. J. 1425 (1987); Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L. Rev. 1203 (1978). While a minority has adopted the second view set out above, see, *e. g.*, Marshall, Fighting the Words of the Eleventh Amendment, 102 Harv. L. Rev. 1342 (1989); Massey, State Sovereignty and the Tenth and Eleventh Amendments, 56 U. Chi. L. Rev. 61 (1989), and others have criticized the diversity theory, see, *e. g.*, Marshall, The Diversity Theory of the Eleventh Amendment: A Critical Evaluation, 102 Harv. L. Rev. 1372 (1989), I have discovered no commentator affirmatively advocating the position taken by the Court today. As one scholar has observed, the literature is "remarkably consistent in its evaluation of the historical evidence and text of the amendment as not supporting a broad rule of constitutional immunity for states." Jackson, *supra*, at 44, n. 179.

> "[N]o state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States." Gazette of the United States 303 (Feb. 20, 1793).

With its references to suits by citizens as well as noncitizens, the Sedgwick amendment would necessarily have been applied beyond the Diversity Clauses, and for a reason that would have been wholly obvious to the people of the time. Sedgwick sought such a broad amendment because many of the States, including his own, owed debts subject to collection under the Treaty of Paris. Suits to collect such debts would "arise under" that Treaty and thus be subject to federal-question jurisdiction under Article III. Such a suit, indeed, was then already pending against Massachusetts, having been brought in this Court by Christopher Vassal, an erstwhile Bostonian whose move to England on the eve of revolutionary hostilities had presented his former neighbors with the irresistible temptation to confiscate his vacant mansion. 5 Documentary History of the Supreme Court of the United States, 1789–1800, pp. 352–449 (M. Marcus ed. 1994).[9]

---

[9] Vassall initiated a suit against Massachusetts, invoking the original jurisdiction of the Supreme Court. Although the marshal for the district of Massachusetts served a subpoena on Governor John Hancock and Attor-

Congress took no action on Sedgwick's proposal, however, and the Amendment as ultimately adopted two years later could hardly have been meant to limit federal-question jurisdiction, or it would never have left the States open to federal-question suits by their own citizens. To be sure, the majority of state creditors were not citizens, but nothing in the Treaty would have prevented foreign creditors from selling their debt instruments (thereby assigning their claims) to citizens of the debtor State. If the Framers of the Eleventh Amendment had meant it to immunize States from federal-question suits like those that might be brought to enforce the Treaty of Paris, they would surely have drafted the Amendment differently. See Fletcher, The Diversity Explanation of the Eleventh Amendment: A Reply to Critics, 56 U. Chi. L. Rev. 1261, 1280–1282 (1989).

It should accordingly come as no surprise that the weightiest commentary following the Amendment's adoption described it simply as constricting the scope of the Citizen-State Diversity Clauses. In *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), for instance, Chief Justice Marshall, writing for the Court, emphasized that the Amendment had no effect on federal courts' jurisdiction grounded on the "arising under" provision of Article III and concluded that "a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case." *Id.*, at 383. The point of the Eleventh Amendment, according to *Cohens*, was to bar jurisdiction in suits at common law by Revolutionary War debt creditors,

---

ney General James Sullivan, the Commonwealth of Massachusetts did not appear by the original return date of August 1793, and the case was continued to the February 1794 Term. Massachusetts never did appear, and the case was "simply continued from term to term through 1796." 5 Documentary History of the Supreme Court of the United States, at 369. In February 1797 the suit was "dismissed with Costs, for reasons unknown," *ibid.* (internal quotation marks omitted), perhaps because "Vassall failed to prosecute it properly," *ibid.*

not "to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation." *Id.*, at 407.

The treatment of the Amendment in *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824), was to the same effect. The Amendment was held there to be no bar to an action against the State seeking the return of an unconstitutional tax. "The eleventh amendment of the constitution has exempted a State from the suits of citizens of other States, or aliens," Marshall stated, omitting any reference to cases that arise under the Constitution or federal law. *Id.*, at 847.

The good sense of this early construction of the Amendment as affecting the diversity jurisdiction and no more has the further virtue of making sense of this Court's repeated exercise of appellate jurisdiction in federal-question suits brought against States in their own courts by out-of-staters. Exercising appellate jurisdiction in these cases would have been patent error if the Eleventh Amendment limited federal-question jurisdiction, for the Amendment's unconditional language ("shall not be construed") makes no distinction between trial and appellate jurisdiction.[10] And yet, again and again we have entertained such appellate cases, even when brought against the State in its own name by a private plaintiff for money damages. See, *e. g., Commonwealth Edison Co.* v. *Montana,* 453 U. S. 609 (1981); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue,* 460 U. S. 575 (1983). The best explanation for our practice belongs to Chief Justice Marshall: the Eleventh Amendment bars only those suits in which the sole basis for federal jurisdiction is diversity of citizenship. See *Atascadero State Hospital* v. *Scanlon,* 473 U. S., at 294 (Brennan, J., dissenting); Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L. J. 1, 44 (1988).

---

[10] We have generally rejected Eleventh Amendment challenges to our appellate jurisdiction on the specious ground that an appeal is not a "suit" for purposes of the Amendment. See, *e. g.*, *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 27 (1990). Although *Cohens* v. *Virginia*, 6 Wheat. 264, 412 (1821), is cited for this proposition, that case involved a State as plaintiff. See generally Jackson, 98 Yale L. J., at 32–35 (rejecting the appeal/suit distinction). The appeal/suit distinction, in any case, makes no sense. Whether or not an appeal is a "suit" in its own right, it is certainly a means by which an appellate court exercises jurisdiction over a "suit" that began in the courts below. Cf. *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56, 58 (1982) *(per curiam)* ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal").

In sum, reading the Eleventh Amendment solely as a limit on citizen-state diversity jurisdiction has the virtue of coherence with this Court's practice, with the views of John Marshall, with the history of the Amendment's drafting, and with its allusive language. Today's majority does not appear to disagree, at least insofar as the constitutional text is concerned; the Court concedes, after all, that "the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts." *Ante,* at 54.[11]

Thus, regardless of which of the two plausible readings one adopts, the further point to note here is that there is no possible argument that the Eleventh Amendment, by its terms, deprives federal courts of jurisdiction over all citizen lawsuits against the States. Not even the Court advances that proposition, and there would be no textual basis for doing so.[12] Because the plaintiffs in today's case are citizens of the

---

[11] See also *Pennsylvania* v. *Union Gas Co.,* 491 U. S., at 31 (SCALIA, J., concurring in part and dissenting in part) ("If this text [of the Eleventh Amendment] were intended as a comprehensive description of state sovereign immunity in federal courts . . . then it would unquestionably be most reasonable to interpret it as providing immunity only when the *sole basis* of federal jurisdiction is the diversity of citizenship that it describes (which of course tracks some of the diversity jurisdictional grants in U. S. Const., Art. III, §2). For there is no plausible reason why one would wish to protect a State from being sued in federal court for violation of federal law . . . when the plaintiff is a citizen of another State or country, but to permit a State to be sued there when the plaintiff is citizen of the State itself").

---

[12] The Court does suggest that the drafters of the Eleventh Amendment may not have had federal-question jurisdiction in mind, in the apparent belief that this somehow supports its reading. *Ante,* at 69–70. The possibility, however, that those who drafted the Eleventh Amendment intended to deal "only with the problem presented by the decision in *Chisholm*" would demonstrate, if any demonstration beyond the clear language of the Eleventh Amendment were necessary, that the Eleventh Amendment was not intended to address the broader issue of federal-question suits brought by citizens.

Moreover, the Court's point is built on a faulty foundation. The Court is simply incorrect in asserting that "the federal courts did not have federal-question jurisdiction at the time the Amendment was passed." *Ibid.* Article III, of course, provided for such jurisdiction, and early Congresses exercised their authority pursuant to Article III to confer jurisdiction on the federal courts to resolve various matters of federal law. *E. g.,* Act of Apr. 10, 1790, § 5, 1 Stat. 111; Act of Feb. 21, 1793, § 6, 1 Stat. 322; Act of Mar. 23, 1792, §§ 2, 3, 1 Stat. 244; see also *Osborn* v. *Bank of United States,* 9 Wheat. 738 (1824) (holding that federal statute conferred federal-question jurisdiction in cases involving the Bank of the United States); see generally P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 960–982 (3d ed. 1988). In fact, only six years after the passage of the Eleventh Amendment, Congress enacted a statute providing for general federal-question jurisdiction. Act of Feb. 13, 1801, § 11, 2 Stat. 92 ("[T]he said circuit courts respectively shall have cognizance of . . . all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made, under their authority"). It is, of course, true that this statute proved short lived (it was repealed by the Act of Mar. 8, 1802, 2 Stat. 132), and that Congress did not pass another statute conferring general federal jurisdiction until 1875, but the drafters of the Eleventh Amendment obviously could not have predicted such things. The real significance of the 1801 Act is that it demonstrates the awareness among the Members of the early Congresses of the potential scope of Article III. This, in combination with the pre-Eleventh Amendment statutes that conferred federal-question jurisdiction on the federal courts, cast considerable doubt on the Court's suggestion that the issue of federal-question jurisdiction never occurred to the drafters of the Elev-

State that they are suing, the Eleventh Amendment simply does not apply to them. We must therefore look elsewhere for the source of that immunity by which the Court says their suit is barred from a federal court.[13]

II

The obvious place to look elsewhere, of course, is *Hans* v. *Louisiana,* 134 U. S. 1 (1890), and *Hans* was indeed a leap in the direction of today's holding, even though it does not take the Court all the way. The parties in *Hans* raised, and the Court in that case answered, only what I have called the second question, that is, whether the Constitution, without

---

enth Amendment; on the contrary, just because these early statutes underscore the early Congresses' recognition of the availability of federal-question jurisdiction, the silence of the Eleventh Amendment is all the more deafening.

[13] The majority chides me that the "lengthy analysis of the text of the Eleventh Amendment is directed at a straw man," *ante,* at 69. But plain text is the Man of Steel in a confrontation with "background principle[s]" and "'postulates which limit and control,'" *ante,* at 68, 72. An argument rooted in the text of a constitutional provision may not be guaranteed of carrying the day, but insubstantiality is not its failing. See, *e. g.,* Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353, 383–384 (1981) ("For the purposes of *legal* reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration"); cf. *Bourjaily* v. *United States,* 483 U. S. 171, 178 (1987) (REHNQUIST, C. J.) ("It would be extraordinary to require legislative history to *confirm* the plain meaning of [Federal Rule of Evidence] 104"); *Garcia* v. *United States,* 469 U. S. 70, 75 (1984) (REHNQUIST, J.) ("[O]nly the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language"). This is particularly true in construing the jurisdictional provisions of Article III, which speak with a clarity not to be found in some of the more open-textured provisions of the Constitution. See *National Mut. Ins. Co.* v. *Tidewater Transfer Co.,* 337 U. S. 582, 646–647 (1949) (Frankfurter, J., dissenting); Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 424 (1985) (noting the "seemingly plain linguistic mandate" of the Eleventh Amendment). That the Court thinks otherwise is an indication of just how far it has strayed beyond the boundaries of traditional constitutional analysis.

more, permits a State to plead sovereign immunity to bar the exercise of federal-question jurisdiction. See *id.*, at 9. Although the Court invoked a principle of sovereign immunity to cure what it took to be the Eleventh Amendment's anomaly of barring only those state suits brought by noncitizen plaintiffs, the *Hans* Court had no occasion to consider whether Congress could abrogate that background immunity by statute. Indeed (except in the special circumstance of Congress's power to enforce the Civil War Amendments), this question never came before our Court until *Union Gas*, and any intimations of an answer in prior cases were mere dicta. In *Union Gas* the Court held that the immunity recognized in *Hans* had no constitutional status and was subject to congressional abrogation. Today the Court overrules *Union Gas* and holds just the opposite. In deciding how to choose between these two positions, the place to begin is with *Hans*'s holding that a principle of sovereign immunity derived from the common law insulates a State from federal-question jurisdiction at the suit of its own citizen. A critical examination of that case will show that it was wrongly decided, as virtually every recent commentator has concluded.[14] It follows that the Court's further step today of constitutionalizing *Hans*'s rule against abrogation by Congress compounds and immensely magnifies the century-old mistake of *Hans* itself and takes its place with other historic examples of textually untethered elevations of judicially derived rules to the status of inviolable constitutional law.

A

The Louisiana plaintiff in *Hans* held bonds issued by that State, which, like virtually all of the Southern States, had issued them in substantial amounts during the Reconstruction era to finance public improvements aimed at stimulating industrial development. E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, pp. 383–384 (1988); Gibbons, 83 Colum. L. Rev., at 1976–1977. As Reconstruction governments collapsed, however, the post-Reconstruction regimes sought to repudiate these debts, and the *Hans* litigation arose out of Louisiana's attempt to renege on its bond obligations.

---

[14] Professor Jackson has noted the "remarkabl[e] consisten[cy]" of the scholarship on this point, Jackson, 98 Yale L. J., at 44, n. 179. See also n. 8, *supra*.

Hans sued the State in federal court, asserting that the State's default amounted to an impairment of the obligation of its contracts in violation of the Contract Clause. This Court affirmed the dismissal of the suit, despite the fact that the case fell within the federal court's "arising under," or federal-question, jurisdiction. Justice Bradley's opinion did not purport to hold that the terms either of Article III or of the Eleventh Amendment barred the suit, but that the ancient doctrine of sovereign immunity that had inspired adoption of the Eleventh Amendment applied to cases beyond the Amendment's scope and otherwise within the federal-question jurisdiction. Indeed, Bradley explicitly admitted that "[i]t is true, the amendment does so read [as to permit Hans's suit], and if there were no other reason or ground for abating his suit, it might be maintainable." *Hans,* 134 U. S., at 10. The Court elected, nonetheless, to recognize a broader immunity doctrine, despite the want of any textual manifestation, because of what the Court described as the anomaly that would have resulted otherwise: the Eleventh Amendment (according to the Court) would have barred a federal-question suit by a noncitizen, but the State would have been subject to federal jurisdiction at its own citizen's behest. *Id.,* at 10–11. The State was accordingly held to be free to resist suit without its consent, which it might grant or withhold as it pleased.

Hans thus addressed the issue implicated (though not directly raised) in the preratification debate about the Citizen-State Diversity Clauses and implicitly settled by *Chisholm:* whether state sovereign immunity was cognizable by federal courts on the exercise of federal-question jurisdiction. According to *Hans,* and contrary to *Chisholm,* it was. But that is all that *Hans* held. Because no federal legislation purporting to pierce state immunity was at issue, it cannot fairly be said that *Hans* held state sovereign immunity to have attained some constitutional status immunizing it from abrogation.[15]

Taking *Hans* only as far as its holding, its vulnerability is apparent. The Court rested its opinion on avoiding the supposed anomaly of recognizing jurisdiction to entertain a citizen's federal-question suit, but not one brought by a noncitizen. See *Hans, supra,* at 10–11. There was, however, no such anomaly at all. As already explained, federal-question cases are not touched by the Eleventh Amendment, which leaves a State open to federal-question suits by citizens and noncitizens alike. If Hans had been from Massachusetts the Eleventh Amendment would not have barred his action against Louisiana.

Although there was thus no anomaly to be cured by *Hans,* the case certainly created its own anomaly in leaving federal courts entirely without jurisdiction to enforce paramount federal law at the behest of a citizen against a State that broke it. It destroyed the congruence of the judicial power under Article III with the substantive guarantees of the Constitution, and with the provisions of statutes passed by Congress in the exercise of its power under Article I: when a State injured an individual in violation of federal law no federal forum could provide direct relief. Absent an alternative process to vindicate federal law (see Part IV, *infra*) John Marshall saw just what the consequences of this anomaly would be in the early Republic, and he took that consequence as good evidence that the Framers could never have intended such a scheme.

---

[15] Indeed, as JUSTICE STEVENS suggests, there is language in *Hans* suggesting that the Court was really construing the Judiciary Act of 1875 rather than the Constitution. See *ante,* at 84–87.

> "Different States may entertain different opinions on the true construction of the constitutional powers of congress. We know that, at one time, the assumption of the debts contracted by the several States, during the war of our Revolution, was deemed unconstitutional by some of them. . . . States may legislate in conformity to their opinions, and may enforce those opinions by penalties. It would be hazarding too much to assert that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist." *Cohens* v. *Virginia*, 6 Wheat., at 386–387.

And yet that is just what *Hans* threatened to do.

How such a result could have been threatened on the basis of a principle not so much as mentioned in the Constitution is difficult to understand. But history provides the explanation. As I have already said, *Hans* was one episode in a long story of debt repudiation by the States of the former Confederacy after the end of Reconstruction. The turning point in the States' favor came with the Compromise of 1877, when the Republican Party agreed effectively to end Reconstruction and to withdraw federal troops from the South in return for Southern acquiescence in the decision of the Electoral Commission that awarded the disputed 1876 presidential election to Rutherford B. Hayes. See J. Orth, Judicial Power of the United States: The Eleventh Amendment in American History 53–57 (1987); Gibbons, *supra*, at 1978–

1982; see generally Foner, Reconstruction, at 575–587 (describing the events of 1877 and their aftermath). The troop withdrawal, of course, left the federal judiciary "effectively without power to resist the rapidly coalescing repudiation movement." Gibbons, 83 Colum. L. Rev., at 1981. Contract Clause suits like the one brought by Hans thus presented this Court with "a draconian choice between repudiation of some of its most inviolable constitutional doctrines and the humiliation of seeing its political authority compromised as its judgments met the resistance of hostile state governments." *Id.*, at 1974. Indeed, Louisiana's brief in *Hans* unmistakably bore witness to this Court's inability to enforce a judgment against a recalcitrant State: "The solemn obligation of a government arising on its own acknowledged bond would not be enhanced by a judgment rendered on such bond. If it either could not or would not make provision for paying the bond, it is probable that it could not or would not make provision for satisfying the judgment." Brief for Respondent in No. 4, O. T. 1889, p. 25. Given the likelihood that a judgment against the State could not be enforced, it is not wholly surprising that the *Hans* Court found a way to avoid the certainty of the State's contempt.[16]

---

[16] See Gibbons, 83 Colum. L. Rev., at 2000 ("Without weakening the contract clause, which over the next two decades the Fuller Court might need both in its fight against government regulation of business and as a weapon against defaulting local governments, the justices needed a way to let the South win the repudiation war. The means Bradley chose was to rewrite the eleventh amendment and the history of its adoption"). The commentators' contention that this Court's inability to enforce the obligation of Southern States to pay their debts influenced the result in *Hans* v. *Louisiana*, 134 U. S. 1 (1890), is substantiated by three anomalies of this Court's sovereign immunity jurisprudence during that period. First, this Court held in 1885 that Virginia's sovereign immunity did not allow it to abrogate its bonds. *Virginia Coupon Cases*, 114 U. S. 269. The difference from the situation in other States, however, was that Virginia had made its bond coupons receivable in payment of state taxes; "[u]nder these circumstances federal courts did not need to rely on the political branches of government to enforce their orders but could protect creditors by a

So it is that history explains, but does not honor, *Hans.* The ultimate demerit of the case centers, however, not on its politics but on the legal errors on which it rested.[17] Before

---

judgment that their taxes had in fact been paid. In these cases the Eleventh Amendment faded into the background." J. Orth, Judicial Power of the United States: The Eleventh Amendment in American History 9 (1987); see generally *id.*, at 90–109. Second, at the same time that this Court was articulating broad principles of immunity for States, we refused to recognize similar immunity for municipalities and similar state political subdivisions. See, *e. g., Lincoln County* v. *Luning,* 133 U. S. 529 (1890). Professor Orth suggests that this seeming inconsistency is traceable to the enforcement difficulties arising from the withdrawal of federal troops from the South. "It just so happened," he points out, "that counties had tended to issue bonds in the West, while in the South, states had usually done the job. Property in the form of bonds could be defended in the mid-West and West, but similar property in the South had to be sacrificed to the higher politics of the Compromise of 1877." Orth, *supra,* at 111. Finally, Professor Orth attributes this Court's recognition (or revival) of the *Ex parte Young,* 209 U. S. 123 (1908), action as a way around state sovereign immunity to the fact that, by 1908, "the problem of repudiated Southern bonds was clearly a specter from an increasingly distant past." Orth, *supra,* at 128. See also Gibbons, *supra,* at 2002 (arguing that the Court's unanimous revival of its power to grant equitable relief against state officers in *Pennoyer* v. *McConnaughy,* 140 U. S. 1 (1891), was made possible by the fact that the case "did not involve Southern State bonds"). I am reluctant, to be sure, to ascribe these legal developments to a single, extralegal cause, and at least one commentator has suggested that the Southern debt crisis may not have been the only factor driving the Court's Eleventh Amendment jurisprudence during this period. See generally Collins, The Conspiracy Theory of the Eleventh Amendment, 88 Colum. L. Rev. 212 (1988) (reviewing Orth). But neither would I ignore the pattern of the cases, which tends to show that the presence or absence of enforcement difficulties significantly influenced the path of the law in this area. See *id.*, at 243 (acknowledging that "[i]t is perfectly conceivable that Compromise-related politics exerted their influence at the margin—in doubtful cases in which the Court might have gone either way").

[17] Today's majority condemns my attention to *Hans*'s historical circumstances as "a disservice to the Court's traditional method of adjudication." *Ante,* at 69. The point, however, is not that historical circumstance may undermine an otherwise defensible decision; on the contrary, it is just because *Hans* is so utterly indefensible on the merits of its legal analysis

considering those errors, it is necessary to address the Court's contention that subsequent cases have read into *Hans* what was not there to begin with, that is, a background principle of sovereign immunity that is constitutional in stature and therefore unalterable by Congress.

B

The majority does not dispute the point that *Hans* v. *Louisiana*, 134 U. S. 1 (1890), had no occasion to decide whether Congress could abrogate a State's immunity from federal-question suits. The Court insists, however, that the negative answer to that question that it finds in *Hans* and subsequent opinions is not "mere *obiter dicta*, but rather . . . the well-established rationale upon which the Court based the results of its earlier decisions." *Ante*, at 66–67. The exact rationale to which the majority refers, unfortunately, is not easy to discern. The Court's opinion says, immediately after its discussion of *stare decisis*, that "[f]or over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Ante*, at 67. This cannot be the "rationale," though, because this Court has repeatedly acknowledged that the Eleventh Amendment standing alone

---

that one is forced to look elsewhere in order to understand how the Court could have gone so far wrong. Nor is there anything new or remarkable in taking such a look, for we have sought similar explanations in other cases. In *Puerto Rico* v. *Branstad*, 483 U. S. 219 (1987), for example, we suggested that the Court's holding in *Kentucky* v. *Dennison*, 24 How. 66 (1861), that "the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it," *id.*, at 107, was influenced by "the looming shadow of a Civil War," *Branstad*, *supra*, at 227, and we ultimately determined that *Dennison* should be overruled, 483 U. S., at 230. The author of the Court's opinion today joined that analysis, as did the other Members of today's majority who were then on the Court. See *ibid.* (O'CONNOR, J., concurring in part and concurring in judgment) (joining the relevant portion of the majority opinion); *id.*, at 231 (SCALIA, J., concurring in part and concurring in judgment) (same).

cannot bar a federal-question suit against a State brought by a state citizen. See, *e. g., Edelman* v. *Jordan,* 415 U. S. 651, 662 (1974) (acknowledging that "the Amendment by its terms does not bar suits against a State by its own citizens").[18] Indeed, as I have noted, Justice Bradley's opinion in *Hans* conceded that Hans might successfully have pursued his claim "if there were no other reason or ground [other than the Amendment itself] for abating his suit." 134 U. S., at 10. The *Hans* Court, rather, held the suit barred by a non-constitutional common-law immunity. See *supra,* at 116–117.

The "rationale" which the majority seeks to invoke is, I think, more nearly stated in its quotation from *Principality of Monaco* v. *Mississippi,* 292 U. S. 313, 321–323 (1934). There, the Court said that "we cannot rest with a mere literal application of the words of §2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States." *Id.,* at 322.[19] This statement certainly is true to *Hans,* which clearly recognized a pre-existing principle of sovereign immunity, broader than the Eleventh Amendment itself, that will ordinarily bar federal-question suits against a nonconsenting State. That was the "rationale" which was sufficient to decide *Hans* and all of its progeny prior to *Union Gas.* But leaving aside the indefensibility of that rationale, which I will address further below, that was as far as it went.

---

[18] See also *Georgia Railroad & Banking Co.* v. *Redwine,* 342 U. S. 299, 304 (1952) (same); *Fitts* v. *McGhee,* 172 U. S. 516, 524 (1899) (same). Even JUSTICE SCALIA's dissent in *Union Gas,* the reasoning of which the majority adopts today, acknowledged that its view of sovereign immunity depended upon "some other constitutional principle beyond the immediate text of the Eleventh Amendment." 491 U. S., at 31 (opinion concurring in part and dissenting in part). To the extent that our prior cases do refer to *Hans* immunity as part of the Eleventh Amendment, they can only be referring to JUSTICE STEVENS's "other" Eleventh Amendment. *Hess* v. *Port Authority Trans-Hudson Corporation,* 513 U. S. 30, 53 (1994) (STEVENS, J., concurring); see also *Pennsylvania* v. *Union Gas Co., supra,* at 23–29 (STEVENS, J., concurring) (same).

[19] See also *Union Gas,* 491 U. S., at 31–32 (SCALIA, J., concurring in part and dissenting in part) ("What we said in *Hans* was, essentially, that the Eleventh Amendment was important not merely for what it said but for what it reflected: a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away"); *Nevada* v. *Hall,* 440 U. S., at 440 (REHNQUIST, J., dissenting) (interpreting *Monaco* as

The majority, however, would read the "rationale" of *Hans* and its line of subsequent cases as answering the further question whether the "postulate" of sovereign immunity that "limit[s] and control[s]" the exercise of Article III jurisdiction, *Monaco, supra,* at 322, is constitutional in stature and therefore unalterable by Congress. It is true that there are statements in the cases that point toward just this conclusion. See, *e. g., Pennhurst State School and Hospital* v. *Halderman,* 465 U. S. 89, 98 (1984) ("In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III"); *Ex parte New York,* 256 U. S. 490, 497 (1921) ("[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . ."). These statements, however, are dicta in the classic sense, that is, sheer speculation about what would happen in cases not before the court.[20] But this

---

"rel[ying] on precepts underlying but not explicit in Art. III and the Eleventh Amendment").

[20] There are good reasons not to take many of these statements too seriously. Some are plainly exaggerated; for example, the suggestion in *Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47, 51 (1944), that "[a] state's freedom from litigation was established as a constitutional right through the Eleventh Amendment" obviously ignores a State's liability to suit by other States, see, *e. g., South Dakota* v. *North Carolina,* 192 U. S. 286 (1904), and by the National Government, see, *e. g., United States* v. *Texas,* 143 U. S. 621 (1892). See also *Nevada* v. *Hall, supra,* at 420, n. 19 (noting that "the Eleventh Amendment has not accorded the States absolute sovereign immunity in federal-court actions"). Similarly, statements such as in *Ex parte New York,* 256 U. S., at 497, that "the entire judicial

is not the only weakness of these statements, which are counterbalanced by many other opinions that have either stated the immunity principle without more, see, *e. g., Dellmuth* v. *Muth,* 491 U. S. 223, 229, n. 2 (1989) (noting that "an unconsenting State is immune from liability for damages in a suit brought in federal court by one of its own citizens," without suggesting that the immunity was unalterable by Congress),[21] or have suggested that the *Hans* immunity is not of constitutional stature. The very language quoted by the majority from *Monaco,* for example, likens state sovereign immunity to other "essential postulates" such as the rules of justiciability. 292 U. S., at 322. Many of those rules, as JUSTICE STEVENS points out, are prudential in nature and therefore not unalterable by Congress. See *ante,* at 88–90.[22] More generally, the proponents of the Court's theory have repeatedly referred to state sovereign immunity as a "background principle," *ante,* at 72, "postulate," *Nevada* v. *Hall,* 440 U. S., at 437 (REHNQUIST, J., dissenting), or "implicit limitation," *Welch* v. *Texas Dept. of Highways and Public Transp.,* 483 U. S. 468, 496 (1987) (SCALIA, J., concurring in part and concurring in judgment), and as resting on the "inherent nature of sovereignty," *Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47, 51 (1944), rather than any explicit con-

---

power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given" should not necessarily be taken as affirming that Article III itself incorporated a constitutional immunity doctrine. How else to explain Justice Harlan's concurring opinion in *Hans,* which stated, practically in the same breath, that "a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends," and that *Chisholm* "was based upon a sound interpretation of the Constitution as that instrument then was"? 134 U. S., at 21.

[21] See also *Georgia Railroad & Banking Co.* v. *Redwine, supra,* at 304; *Fitts* v. *McGhee, supra,* at 524–525.

[22] See also *Warth* v. *Seldin,* 422 U. S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules"); E. Chemerinsky, Federal Jurisdiction § 2.1, pp. 42–43 (2d ed. 1994).

stitutional provision.[23] But whatever set of quotations one may prefer, taking heed of such jurisprudential creations in assessing the contents of federal common law is a very different thing from reading them into the Founding Document itself.

The most damning evidence for the Court's theory that *Hans* rests on a broad rationale of immunity unalterable by Congress, however, is the Court's proven tendency to disregard the post-*Hans* dicta in cases where that dicta would have mattered.[24] If it is indeed true that "private suits against States [are] not permitted under Article III (by virtue of the understanding represented by the Eleventh Amendment)," *Union Gas*, 491 U. S., at 40 (SCALIA, J., concurring in part and dissenting in part), then it is hard to see how a State's sovereign immunity may be waived any more than it may be abrogated by Congress. See, *e. g., Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 238 (recognizing that immunity may be waived). After all, consent of a party is in all other instances wholly insufficient to create subject-matter jurisdiction where it would not otherwise exist. See, *e. g., Sosna* v. *Iowa*, 419 U. S. 393, 398 (1975); see also E. Chemerinsky, Federal Jurisdiction § 7.6, p. 405 (2d ed. 1994) (noting that "allowing such waivers seems inconsistent with viewing the Eleventh Amendment as a restriction on the federal courts' subject matter jurisdiction"). Likewise, the Court's broad theory of immunity runs doubly afoul of the appellate jurisdiction problem that I noted earlier in rejecting an interpretation of the Eleventh Amendment's text that would bar federal-question suits. See *supra*, at 109–116. If "the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own State without its consent," *Duhne* v. *New Jersey*, 251 U. S. 311, 313 (1920), and if consent to suit in state court is not sufficient to show consent in federal court, see *Atascadero, supra*, at 241, then Article III would hardly permit this Court to exercise appellate jurisdiction over issues of federal law arising in lawsuits brought against the States in their own courts. We have, however, quite rightly ignored any post-*Hans* dicta in that sort of case and exercised the jurisdiction that the plain text of Article III provides. See, *e. g., Fulton Corp.* v. *Faulkner*, 516 U. S. 325 (1996); see also *supra*, at 113–114.

---

[23] Indeed, THE CHIEF JUSTICE could hardly have been clearer in *Fry* v. *United States*, 421 U. S. 542 (1975), where he explained that "[t]he Court's decision in *Hans* v. *Louisiana*, 134 U. S. 1 (1890), offers impressive authority for the principle that the States as such were regarded by the Framers of the Constitution as partaking of many attributes of sovereignty quite apart from the provisions of the Tenth Amendment. . . .

"As it was not the Eleventh Amendment by its terms which justified the result in *Hans*, it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation." *Id.*, at 556–557 (dissenting opinion).

[24] Indeed, in *Nevada* v. *Hall*, *supra*, at 439, THE CHIEF JUSTICE complained in dissent that the same statements upon which he relies today had been "dismiss[ed] . . . as dicta."

If these examples were not enough to distinguish *Hans*'s rationale of a pre-existing doctrine of sovereign immunity from the post-*Hans* dicta indicating that this immunity is constitutional, one would need only to consider a final set of cases: those in which we have assumed, without deciding, that congressional power to abrogate state sovereign immunity exists even when § 5 of the Fourteenth Amendment has no application. A majority of this Court was willing to make that assumption in *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U. S. 96, 101 (1989) (plurality opinion), in *Welch* v. *Texas Dept. of Highways and Public Transp., supra*, at 475 (plurality opinion), and in *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226, 252

(1985).[25] Although the Court in each of these cases failed to find abrogation for lack of a clear statement of congressional intent, the assumption that such power was available would hardly have been permissible if, at that time, today's majority's view of the law had been firmly established. It is one thing, after all, to avoid an open constitutional question by assuming an answer and rejecting the claim on another ground; it is quite another to avoid a settled rationale (an emphatically settled one if the majority is to be taken seriously) only to reach an issue of statutory construction that the Court would otherwise not have to decide. Even worse, the Court could not have been unaware that its decision of cases like *Hoffman* and *Welch*, on the ground that the statutes at issue lacked a plain statement of intent to abrogate, would invite Congress to attempt abrogation in statutes like the Indian Gaming Regulatory Act, 25 U. S. C. § 2701 *et seq.* (IGRA). Such a course would have been wholly irresponsible if, as the majority now claims, the constitutionally unalterable nature of *Hans* immunity had been well established for a hundred years.

Hans itself recognized that an "observation [in a prior case that] was unnecessary to the decision, and in that sense *extra judicial* . . . ought not to outweigh" present reasoning that points to a different conclusion. 134 U. S., at 20. That is good advice, which Members of today's majority have been willing to heed on other occasions. See, *e. g., Kokkonen* v. *Guardian Life Ins. Co.*, 511 U. S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend"); *Bennis* v. *Michigan*, 516 U. S. 442, 450 (1996). But because the Court disregards this norm today, I must consider the soundness of *Hans*'s original recognition of a background principle of sovereign immunity that applies even in federal-question suits, and the reasons that counsel against the Court's extension of *Hans*'s holding to the point of rendering its immunity unalterable by Congress.

---

[25] In *Hoffman*, one Member of the four-Justice plurality expressly disavowed the plurality's assumption that Congress could abrogate the States' immunity by making its intent to do so clear. See 492 U. S., at 105 (O'CONNOR, J., concurring). The four dissenters, however, not only assumed that Congress had the power to abrogate but found that it had done so. See *id.*, at 106 (Marshall, J., dissenting). Likewise, in *Welch*, the four-Justice plurality was joined by four dissenters who insisted upon a congressional power of abrogation. See 483 U. S., at 519 (Brennan, J., dissenting).

III

Three critical errors in *Hans* weigh against constitutionalizing its holding as the majority does today. The first we have already seen: the *Hans* Court misread the Eleventh Amendment, see *supra*, at 118–123. It also misunderstood the conditions under which common-law doctrines were received or rejected at the time of the founding, and it fundamentally mistook the very nature of sovereignty in the young Republic that was supposed to entail a State's immunity to federal-question jurisdiction in a federal court. While I would not, as a matter of *stare decisis*, overrule *Hans* today, an understanding of its failings on these points will show how the Court today simply compounds already serious error in taking *Hans* the further step of investing its rule with constitutional inviolability against the considered judgment of Congress to abrogate it.

A

There is and could be no dispute that the doctrine of sovereign immunity that *Hans* purported to apply had its origins in the "familiar doctrine of the common law," *The Siren*, 7 Wall. 152, 153 (1869), "derived from the laws and practices of our English ancestors," *United States* v. *Lee*, 106 U. S. 196, 205 (1882).[26] Although statutes came to affect its importance in the succeeding centuries, the doctrine was never reduced to codification, and Americans took their understanding of immunity doctrine from Blackstone, see 3 W. Blackstone, Commentaries on the Laws of England, ch. 17 (1768). Here, as in the mother country, it remained a common-law rule. See generally Jaffe, 77 Harv. L. Rev., at 2–19; Borchard, Governmental Responsibility in Tort, VI, 36 Yale L. J. 1, 17–41 (1926).

---

[26] The Court seeks to disparage the common-law roots of the doctrine, and the consequences of those roots which I outline *infra*, at 132–142 and 159–164, by asserting that *Hans* "found its roots not solely in the common law of England, but in the much more fundamental '"jurisprudence in all

This fact of the doctrine's common-law status in the period covering the founding and the later adoption of the Eleventh Amendment should have raised a warning flag to the *Hans* Court and it should do the same for the Court today. For although the Court has persistently assumed that the common law's presence in the minds of the early Framers must

---

civilized nations.""" *Ante*, at 69 (quoting *Hans*, 134 U. S., at 17). The *Hans* Court, however, relied explicitly on the ground that a suit against the State by its own citizen was "not known . . . at the common law" and was not among the departures from the common law recognized by the Constitution. *Id.*, at 15. Moreover, *Hans* explicitly adopted the reasoning of Justice Iredell's dissent in *Chisholm*, see 134 U. S., at 18–19, and that opinion could hardly have been clearer in relying exclusively on the common law. "The only principles of law . . . which can affect this case," Justice Iredell wrote, "[are] those that are derived from what is properly termed 'the common law,' a law which I presume is the ground-work of the laws in every State in the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of Legislation controuls it, to be in force in each State, as it existed in England, (unaltered by any statute) at the time of the first settlement of the country." 2 Dall., at 435 (emphasis deleted). See also *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279, 288 (1973) (Marshall, J., concurring in result) ("Sovereign immunity is a common-law doctrine that long predates our Constitution and the Eleventh Amendment, although it has, of course, been carried forward in our jurisprudence"); R. Watkins, The State as a Party Litigant 51–52 (1927) ("It thus seems probable that the doctrine of state immunity was accepted rather as an existing fact by the people of the states, than adopted as a theory. It was a matter of universal practice, and was accepted from the mother country along with the rest of the common law of England applicable to our changed state and condition").

have functioned as a limitation on their understanding of the new Nation's constitutional powers, this turns out not to be so at all. One of the characteristics of the founding generation, on the contrary, was its joinder of an appreciation of its immediate and powerful common-law heritage with caution in settling that inheritance on the political systems of the new Republic. It is not that the Framers failed to see themselves to be children of the common law; as one of their contemporaries put it, "[w]e live in the midst of the common law, we inhale it at every breath, imbibe it at every pore . . . [and] cannot learn another system of laws without learning at the same time another language." P. Du Ponceau, A Dissertation on the Nature and Extent of Jurisdiction of Courts of the United States 91 (1824). But still it is clear that the adoption of English common law in America was not taken for granted, and that the exact manner and extent of the common law's reception were subject to careful consideration by courts and legislatures in each of the new States.[27] An examination of the States' experience with common-law reception will shed light on subsequent theory and practice at the national level, and demonstrate that our history is entirely at odds with *Hans*'s resort to a common-law principle to limit the Constitution's contrary text.

1

This American reluctance to import English common law wholesale into the New World is traceable to the early colonial period. One scholar of that time has written that "[t]he process which we may call the reception of the English common law by the colonies was not so simple as the legal theory would lead us to assume. While their general legal conceptions were conditioned by, and their terminology derived from, the common law, the early colonists were far from applying it as a technical system, they often ignored it or denied its subsidiary force, and they consciously departed from many of its most essential principles." P. Reinsch, English Common Law in the Early American Colonies 58 (1899).[28] For a variety of reasons, including the absence of trained lawyers and judges, the dearth of law books, the religious and ideological commitments of the early settlers, and the novel conditions of the New World, the colonists turned to a variety of other sources in addition to principles of common law.[29]

---

[27] See, *e. g.*, Hall, The Common Law: An Account of its Reception in the United States, 4 Vand. L. Rev. 791, 796 (1951) ("Whether we emphasize the imitation by the colonists of the practices of English local courts or whether we say the early colonial judges were really applying their own common-sense ideas of justice, the fact remains that there was an incomplete acceptance in America of English legal principles, and this indigenous law which developed in America remained as a significant source of law after the Revolution").

It is true that, with the development of colonial society and the increasing sophistication of the colonial bar, English common law gained increasing acceptance in colonial practice. See *id.*, at 7–8; Hall, The Common Law: An Account of its Reception in the United States, 4 Vand. L. Rev. 791,

---

[28] See also Jones, The Common Law in the United States: English Themes and American Variations, in Political Separation and Legal Continuity 95–98 (H. Jones ed. 1976) (Jones) (acknowledging that a true common-law system had not yet developed in the early colonial period); Stoebuck, Reception of English Common Law in the American Colonies, 10 Wm. & Mary L. Rev. 393, 406–407 (1968) (same).

[29] See, *e. g.*, Reinsch, English Common Law in the Early American Colonies, at 7 (finding that the colonists developed their own "rude, popular, summary" system of justice despite professed adhesion to the common law); C. Hilkey, Legal Development in Colonial Massachusetts, 1630–1686, p. 69 (1967) (emphasizing Biblical and indigenous sources); Radin, The Rivalry of Common-Law and Civil Law Ideas in the American Colonies, in 2 Law: A Century of Progress 404, 407–411 (1937) (emphasizing natural law and Roman law); Goebel, King's Law and Local Custom in Seventeenth Century New England, 31 Colum. L. Rev. 416 (1931) (finding that the early settlers imported the law and procedure of the borough and manor courts with which they had been familiar in England).

797 (1951).[30] But even in the late colonial period, Americans insisted that

> "the whole body of the common law . . . was not transplanted, but only so much as was applicable to the colonists in their new relations and conditions. Much of the common law related to matters which were purely local, which existed under the English political organization, or was based upon the triple relation of king, lords and commons, or those peculiar social conditions, habits and customs which have no counterpart in the New World. Such portions of the common law, not being applicable to the new conditions of the colonists, were never recognised as part of their jurisprudence." Dale, The Adoption of the Common Law by the American Colonies, 30 Am. L. Reg. 553, 554 (1882).[31]

The result was that "the increasing influx of common-law principles by no means obliterated the indigenous systems which had developed during the colonial era and that there existed important differences in law in action on the two sides of the Atlantic." Hall, *supra*, at 797.

---

[30] See also Stoebuck, *supra*, at 411–412 (indicating that the Colonies became significantly more receptive to the common law after 1700, in part because of a British desire to regularize colonial legal systems).

[31] See also Jones 98 ("The selective nature of the reception is evident in any examination of the state of law in the colonies in the years immediately preceding the Revolution"). An example is Trott's law, adopted by South Carolina in 1712, which declared which English statutes were in force in the Colony. Many laws of England, Trott conceded, were "altogether useless" in South Carolina "by reason of the different way of agriculture and the differing productions of the earth of this Province from that of England"; others were "impracticable" because of differences in institutions. L. Friedman, A History of American Law 90–93 (2d ed. 1985); see also C. Warren, History of the American Bar 122–123 (1911) (quoting North Carolina statute, passed in 1715, providing that the common law would be in force " 'so far as shall be compatible with our way of living and trade' ").

Understandably, even the trend toward acceptance of the common law that had developed in the late colonial period was imperiled by the Revolution and the ultimate break between the Colonies and the old country. Dean Pound has observed that, "[f]or a generation after the Revolution, . . . political conditions gave rise to a general distrust of English law. . . . The books are full of illustrations of the hostility toward English law simply because it was English which prevailed at the end of the eighteenth and in the earlier years of the nineteenth century." R. Pound, The Formative Era of American Law 7 (1938); see also C. Warren, A History of the American Bar 224–225 (1911) (noting a "prejudice against the system of English Common Law" in the years following the Revolution). James Monroe went so far as to write in 1802 that "'the application of the principles of the English common law to our constitution'" should be considered "'good cause for impeachment.'" Letter from James Monroe to John Breckenridge, Jan. 15, 1802 (quoted in 3 A. Beveridge, The Life of John Marshall: Conflict and Construction 1800–1815, p. 59 (1919)).[32] Nor was anti-English sentiment the only difficulty; according to Dean Pound, "[s]ocial and geographical conditions contributed also to make the work of receiving and reshaping the common law exceptionally difficult." Pound, *supra,* at 7.

---

[32] American hostility to things English was so pronounced for a time that Pennsylvania, New Jersey, and Kentucky proscribed by statute the citation of English decisions in their courts, and the New Hampshire courts promulgated a rule of court to the same effect. See Hall, 4 Vand. L. Rev., at 806; Warren, *supra*, at 227. This hostility may appear somewhat paradoxical in view of the colonists' frequent insistence during the revolutionary crisis that they were entitled to common-law rights. See, *e. g.*, First Continental Congress Declaration and Resolves (1774), in Documents Illustrative of the Formation of the Union of the American States, H. R. Doc. No. 398, 69th Cong., 1st Sess., 1, 3 (C. Tansill ed. 1927) ("That the respective colonies are entitled to the common law of England"). In this context, however, the colonists were referring "not to the corpus of English case-law doctrine but to such profoundly valued common law procedures as trial by jury and the subjection of governmental power to what John Locke had called the 'standing laws,'" such as Magna Carta, the Petition of Right, the Bill of Rights of 1689, and the Act of Settlement of 1701. Jones 110; see also Jay, Origins of Federal Common Law: Part Two, 133 U. Pa. L. Rev. 1231, 1256 (1985) (Jay II) (noting that "Antifederalists

The consequence of this anti-English hostility and awareness of changed circumstances was that the independent States continued the colonists' practice of adopting only so much of the common law as they thought applicable to their local conditions.[33] As Justice Story explained, "[t]he com-

---

used the term common law to mean the great rights associated with due process"). The cardinal principles of this common-law vision were parliamentary supremacy and the rule of law, conceived as the axiom that "all members of society, government officials as well as private persons, are equally responsible to the law and . . . 'equally amenable to the jurisdiction of ordinary tribunals.'" Jones 128–129 (quoting A. Dicey, Introduction to Study of the Law of Constitution 192 (9th ed. 1939)). It is hard to imagine that the doctrine of sovereign immunity, so profoundly at odds with both these cardinal principles, could have been imported to America as part of this more generalized common-law vision.

[33] See, *e. g., Conner* v. *Shepherd,* 15 Mass. 164 (1818) (rejecting English common-law rule regarding assignment of dower rights as inapplicable to the state and condition of land in Massachusetts); *Parker & Edgarton* v. *Foote,* 19 Wend. 309, 318 (N. Y. 1838) (rejecting English rule entitling a landowner to damages for the stopping of his lights; the court noted that "[i]t cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no part of our law"); *Fitch* v. *Brainerd,* 2 Conn. 163, 189 (1805) (accepting English common-law rule barring married woman from disposing of her real estate by will, and observing that "it long since became necessary . . . to make [the English common law] our own, by practical *adoption*—with such exceptions as a diversity of circumstances, and the incipient customs of our own country, required") (emphasis in original); *Martin* v. *Bigelow,* 2 Aiken 184 (Vt. 1827) (declaring English common law as to stream rights inappropriate for conditions of Vermont waterways); *Hall* v. *Smith,* 1 Bay 330, 331 (S. C. Sup. Ct. 1793) (refusing to apply strict English rules regarding promissory notes as unsuited to the "local situation of *Carolina*"). See also Hall, *supra,* at 805 ("[A] review of the cases shows that no matter what the wording of the reception statute or constitutional provision of the particular state, the rule developed, which was

mon law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness* v. *Pacard*, 2 Pet. 137, 144 (1829). In 1800, John Marshall had expressed the similar view that "our ancestors brought with them the laws of England, both statute & common law as existing at the settlement of each colony, so far as they were applicable to our situation." Letter from John Marshall to St. George Tucker, Nov. 27, 1800, reprinted in Jay II, App. A, at 1326, 1327. Accordingly, in the period following independence, "[l]egislatures and courts and doctrinal writers had to test the common law at every point with respect to its applicability to America." Pound, *supra*, at 20; see also Jones 103 (observing that "suitab[ility] to local institutions and conditions" was "incomparably the most important" principle of reception in the new States).

2

While the States had limited their reception of English common law to principles appropriate to American conditions, the 1787 draft Constitution contained no provision for adopting the common law at all. This omission stood in sharp contrast to the state constitutions then extant, virtually all of which contained explicit provisions dealing with common-law reception. See n. 55, *infra*. Since the experience in the States set the stage for thinking at the national level, see generally G. Wood, Creation of the American Republic, 1776–1787, p. 467 (1969) (Wood), this failure to address the notion of common-law reception could not have been inadvertent. Instead, the Framers chose to recognize only particular common-law concepts, such as the writ of ha-

---

sooner or later to be repeated in practically every American jurisdiction, that only those principles of the common law were received which were applicable to the local situation").

beas corpus, U. S. Const., Art. I, § 9, cl. 2, and the distinction between law and equity, U. S. Const., Amdt. 7, by specific reference in the constitutional text. See 1 J. Goebel, Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Antecedents and Beginnings to 1801, pp. 229–230 (1971).[34] This approach reflected widespread agreement that ratification would not itself entail a general reception of the common law of England. See Letter from John Marshall to St. George Tucker, Nov. 27, 1800, reprinted in Jay II, App. A, at 1326 ("I do not believe one man can be found" who maintains "that the common law of England has . . . been adopted as the common law of America by the Constitution of the United States"); Jay II, at 1255 (noting that the use of the term "laws" in Article III "could not have been meant to accomplish a general reception of British common law").

Records of the ratification debates support Marshall's understanding that everyone had to know that the new Constitution would not draw the common law in its train. Antifederalists like George Mason went so far as to object that under the proposed Constitution the people would not be "secured even in the enjoyment of the benefit of the common law." Mason, Objections to This Constitution of Government, in 2 Records of the Federal Convention of 1787, p. 637 (M. Farrand ed. 1911) (Farrand); see also 3 Elliot's Debates 446–449 (Patrick Henry, Virginia Convention). In particular, the Antifederalists worried about the failure of the proposed Constitution to provide for a reception of "the great rights associated with due process" such as the right to a jury trial, Jay II, at 1256, and they argued that "Congress's powers to regulate the proceedings of federal courts made the fate of these common-law procedural protections uncertain," *id.*, at 1257.[35] While Federalists met this objection by arguing that nothing in the Constitution necessarily excluded the fundamental common-law protections associated with due process, see, *e. g.*, 3 Elliot's Debates 451 (George Nicholas, Virginia Convention), they defended the decision against any general constitutional reception of the common law on the ground that constitutionalizing it would render it "immutable," see *id.*, at 469–470 (Edmund Randolph, Virginia Convention), and not subject to revision by Congress, *id.*, at 550 (Edmund Pendleton, Virginia Convention); see also *infra*, at 163–164.

---

[34] See also Jones 123–124 (noting that the common-law institutions of habeas corpus and jury trial were "not merely received as ordinary law," but rather "received by [specific textual provisions] of the Constitution itself, as part of the supreme law of the land"). Sovereign immunity, of course, was not elevated to constitutional status in this way; such immunity thus stands on the same footing as any other common-law principle which the Framers refused to place beyond the reach of legislative change. That such principles were and are subject to legislative alteration is confirmed by our treatment of other forms of common-law immunities, such as the immunity enjoyed under certain circumstances by public officials. *Butz* v. *Economou,* 438 U. S. 478, 508 (1978) (officer immunity is derived from the common law); *Imbler* v. *Pachtman,* 424 U. S. 409, 421 (1976) (same). In this context, "our immunity decisions have been informed by the common law" only "in the absence of explicit . . . congressional guidance." *Nixon* v. *Fitzgerald,* 457 U. S. 731, 747 (1982). See generally *ante,* at 87–88 (STEVENS, J., dissenting); Jackson, 98 Yale L. J., at 75–104. Surely no one would deny Congress the power to abrogate those immunities if it should so choose.

The Framers also recognized that the diverse development of the common law in the several States made a general federal reception impossible. "The common law was not the same in any two of the Colonies," Madison observed; "in some the modifications were materially and extensively different." Report on the Virginia Resolutions, House of Delegates, Session of 1799–1800, Concerning Alien and Sedition Laws, in 6 Writings of James Madison 373 (G. Hunt ed. 1906)

---

[35] See, *e. g.*, 2 Elliot's Debates 400 (Thomas Tredwell, New York Convention) ("[W]e are ignorant whether [federal proceedings] shall be according to the common, civil, the Jewish, or Turkish law . . .").

(Alien and Sedition Laws).[36] In particular, although there is little evidence regarding the immunity enjoyed by the various colonial governments prior to the Revolution, the profound differences as to the source of colonial authority between chartered colonies, royal colonies, and so on seems unlikely, wholly apart from other differences in circumstance, to have given rise to a uniform body of immunity law. There was not, then, any unified "Common Law" in America that the Federal Constitution could adopt, Jay I, at 1056; Stoebuck, Reception of English Common Law in the American Colonies, 10 Wm. & Mary L. Rev. 393, 401 (1968) ("The assumption that colonial law was essentially the same in all colonies is wholly without foundation"), and, in particular, probably no common principle of sovereign immunity, cf. Alien and Sedition Laws 376. The Framers may, as Madison, Hamilton, and Marshall argued, have contemplated that federal courts would respect state immunity law in diversity cases, but the generalized principle of immunity that today's majority would graft onto the Constitution itself may well never have developed with any common clarity and, in any event, has not been shown to have existed.

Finally, the Framers' aversion to a general federal reception of the common law is evident from the Federalists' response to the Antifederalist claim that Article III granted an unduly broad jurisdiction to the federal courts. That response was to emphasize the limited powers of the National Government. See, *e. g.*, 3 Elliot's Debates 553 (John Marshall, Virginia Convention) ("Has the government of the United States power to make laws on every subject? . . . Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers?"); Jay II, at 1260.[37] That answer assumes, of course, no generalized reception of English common law as federal law; otherwise, "arising under" jurisdiction would have extended to any subject comprehended by the general common law.

---

[36] See also Justice Jay's Charge to the Grand Jury for the District of New York (Apr. 4, 1790) (observing that at the time the Nation was formed, "[o]ur jurisprudence varied in almost every State, and was accommodated to local, not general convenience—to partial, not national policy") (quoted in Jay, Origins of Federal Common Law: Part One, 133 U. Pa. L. Rev. 1003, 1056, n. 261 (1985) (Jay I)); *United States* v. *Worrall,* 28 F. Cas. 774, 779 (No. 16,766) (CC Pa. 1798) (Chase, J.) (noting that "[t]he common law . . . of one state, is not the common law of another"); 8 Annals of Cong. 2137 (1798) (statement of Rep. Albert Gallatin) (asserting that there could be no national common law because "[t]he common law of Great Britain received in each colony, had in every one received modifications arising from their situation . . . and now each State had a common law, in its general principles the same, but in many particulars differing from each other").

Madison made this assumption absolutely clear during the subsequent debates over the Alien and Sedition Acts, which raised the issue of whether the Framers intended to recognize a general federal jurisdiction to try common-law crimes. Rejecting the idea of any federal reception, Madison insisted that

> "the consequence of admitting the common law as the law of the United States, on the authority of the individual States, is as obvious as it would be fatal. As this law relates to every subject of legislation, and would be paramount to the Constitutions and laws of the States, the admission of it would overwhelm the residuary sovereignty of the States, and by one constructive operation new model the whole political fabric of the country." Alien and Sedition Laws 381.

See also 1 Goebel, Oliver Wendell Holmes Devise History of the Supreme Court of the United States, at 651–655 (discussing the lack of evidence to support the proposition that the Framers intended a general reception of the English common law through the Constitution); Jay II, at 1254 (arguing that "[i]t would have been untenable to maintain that the body of British common law had been adopted by the Constitution . . . "). Madison concluded that

---

[37] See also Jay II, at 1241–1250 (arguing that Jeffersonian Republicans resisted the idea of a general federal reception of the common law as an incursion on States' rights); Jay I, at 1111 (same). Given the roots of the Framers' resistance, the Court's reception of the English common law into the Constitution itself in the very name of state sovereignty goes beyond the limits of irony.

> "[i]t is . . . distressing to reflect that it ever should have been made a question, whether the Constitution, on the whole face of which is seen so much labor to enumerate and define the several objects of Federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law—a law filling so many ample volumes; a law overspreading the entire field of legislation; and a law that would sap the foundation of the Constitution as a system of limited and specified powers." Alien and Sedition Laws 382.

B

Given the refusal to entertain any wholesale reception of common law, given the failure of the new Constitution to make any provision for adoption of common law as such, and given the protests already quoted that no general reception had occurred, the *Hans* Court and the Court today cannot reasonably argue that something like the old immunity doctrine somehow slipped in as a tacit but enforceable background principle. But see *ante,* at 72. The evidence is even more specific, however, that there was no pervasive understanding that sovereign immunity had limited federal-question jurisdiction.

1

As I have already noted briefly, see *supra,* at 105–106, the Framers and their contemporaries did not agree about the place of common-law state sovereign immunity even as to federal jurisdiction resting on the Citizen-State Diversity Clauses. Edmund Randolph argued in favor of ratification on the ground that the immunity would not be recognized, leaving the States subject to jurisdiction.[38] Patrick Henry opposed ratification on the basis of exactly the same reading. See 3 Elliot's Debates 543. On the other hand, James Madison, John Marshall, and Alexander Hamilton all appear to have believed that the common-law immunity from suit would survive the ratification of Article III, so as to be at a State's disposal when jurisdiction would depend on diversity. This would have left the States free to enjoy a traditional immunity as defendants without barring the exercise of judicial power over them if they chose to enter the federal courts as diversity plaintiffs or to waive their immunity as diversity defendants. See *id.*, at 533 (Madison: the Constitution "give[s] a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it");[39] *id.*, at 556 (Marshall: "I see a difficulty in making a state defendant, which does not prevent its being plaintiff"). As Hamilton stated in The Federalist No. 81:

---

[38] See 3 Elliot's Debates 573 (the Constitution would "render valid and effective existing claims" against the States). See also 2 *id.*, at 491 (James Wilson, in the Pennsylvania ratification debate: "When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing"). Wilson, as I noted above, took a similar position in addressing the federal question, or arising under, clause, remarking that the effect of the clause would be to require States to honor pre-Revolutionary debt owed to English merchants, as had been promised in the Treaty of 1783. See n. 4, *supra*.

[39] The Court accuses me of quoting this statement out of context, *ante*, at 70, n. 12, but the additional material included by the Court makes no difference. I am conceding that Madison, Hamilton, and Marshall all agreed that Article III did not of its own force abrogate the States' preexisting common-law immunity, at least with respect to diversity suits. None of the statements offered by the Court, however, purports to deal with federal-question jurisdiction or with the question whether Congress, acting pursuant to its Article I powers, could create a cause of action against a State. As I explain further below, the views of Madison and his

> "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal." The Federalist No. 81, pp. 548–549 (J. Cooke ed. 1961).

See generally Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033, 1045–1054 (1983) (discussing the adoption of the Citizen-State Diversity Clauses); Gibbons, 83 Colum. L. Rev., at 1902–1914. The majority sees in these statements, and chiefly in Hamilton's discussion of sovereign immunity in The Federalist No. 81, an unequivocal mandate "which would preclude all federal jurisdiction over an unconsenting State." *Ante,* at 70. But there is no such mandate to be found.

As I have already said, the immediate context of Hamilton's discussion in Federalist No. 81 has nothing to do with federal-question cases. It addresses a suggestion "that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities." The Federalist No. 81, at 548. Hamilton is plainly talking about a

---

allies on this more difficult question can be divined, if at all, only by reference to the more extended discussions by Hamilton in The Federalist No. 32, and by Justice Iredell in his *Chisholm* dissent. Both those discussions, I submit, tend to support a congressional power of abrogation.

suit subject to a federal court's jurisdiction under the Citizen-State Diversity Clauses of Article III.

The general statement on sovereign immunity emphasized by the majority then follows, along with a reference back to The Federalist No. 32. The Federalist No. 81, at 548. What Hamilton draws from that prior paper, however, is not a general conclusion about state sovereignty but a particular point about state contracts:

> "A recurrence to the principles there established will satisfy us, that there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will." *Id.*, at 549.

The most that can be inferred from this is, as noted above, that in diversity cases applying state contract law the immunity that a State would have enjoyed in its own courts is carried into the federal court. When, therefore, the *Hans* Court relied in part upon Hamilton's statement, see 134 U. S., at 20, its reliance was misplaced; Hamilton was addressing diversity jurisdiction, whereas *Hans* involved federal-question jurisdiction under the Contracts Clause. No general theory of federal-question immunity can be inferred from Hamilton's discussion of immunity in contract suits. But that is only the beginning of the difficulties that accrue to the majority from reliance on The Federalist No. 81.

Hamilton says that a State is "not . . . amenable to the suit of an individual without its consent . . . . [u]nless . . . there is a surrender of this immunity in the plan of the convention." The Federalist No. 81, at 548–549 (emphasis deleted). He immediately adds, however, that "[t]he circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here." *Id.*, at 549. The reference is to The Federalist No. 32, also by Hamilton, which has this to say about the alienation of state sovereignty:

> "[A]s the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant.* I use these terms to distinguish this last case from another which might appear to resemble it; but which would in fact be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority." *Id.*, at 200 (emphasis in original).

As an instance of the last case, in which exercising concurrent jurisdiction may produce interferences in "policy," Hamilton gives the example of concurrent power to tax the same subjects:

> "It is indeed possible that a tax might be laid on a particular article by a State which might render it *inexpedient* that thus a further tax should be laid on the same article

> by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide, and might require reciprocal forbearances. It is not however a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication alienate and extinguish a pre-existing right of sovereignty." *Id.*, at 202 (emphasis in original).

The first embarrassment Hamilton's discussion creates for the majority turns on the fact that the power to regulate commerce with Indian tribes has been interpreted as making "Indian relations . . . the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S., at 234.[40] We have accordingly recognized that "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 170–171 (1973) (internal quotation marks omitted); see also *Rice* v. *Olson*, 324 U. S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history").[41] We have specifically held, moreover, that the States have no power to regulate gambling on Indian lands. *California* v. *Cabazon Band of Mission Indians,* 480 U. S. 202, 221–222 (1987). In sum, since the States have no sovereignty in the regulation of commerce with the tribes, on Hamilton's view there is no source of sovereign immunity to assert in a suit based on congressional regulation of that commerce. If Hamilton is good authority, the majority of the Court today is wrong.

---

[40] See also *Worcester* v. *Georgia*, 6 Pet. 515, 560–561 (1832) ("The Cherokee nation . . . is a distinct community . . . in which the laws of Georgia can have no force. . . . The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States"). This Court has repeatedly rejected state attempts to assert sovereignty over Indian lands. See, *e. g., The New York Indians*, 5 Wall. 761, 769 (1867) (rejecting state attempt to tax reservation lands); *Worcester, supra*, at 561–563 (nullifying an attempted prosecution by the State of Georgia of a person who resided on Indian lands in violation of state law).

Quite apart, however, from its application to this particular Act of Congress exercising the Indian commerce power, Hamilton's sovereignty discussion quoted above places the Court in an embarrassing dilemma. Hamilton posited four categories: congressional legislation on (a) subjects committed expressly and exclusively to Congress, (b) subjects over which state authority is expressly negated, (c) subjects over which concurrent authority would be impossible (as "contradictory and repugnant"), and (d) subjects over which concurrent authority is not only possible, but its exercise by both is limited only by considerations of policy (as when one taxing authority is politically deterred from adding too much to the exaction the other authority is already making). But what of those situations involving concurrent powers, like the power over interstate commerce, see, *e. g., Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots,* 12 How. 299 (1852) (recognizing power of States to engage in some regulation of interstate commerce), when a congressional statute not only binds the States but even creates an affirmative obligation on the State as such, as in this case? Hamilton's discussion does not seem to cover this (quite possibly because, as a good political polemicist, he did not wish to raise it). If in fact it is fair to say that Hamilton does not cover this situation, then the Court cannot claim him as authority for the preservation of state sovereignty and consequent immunity. If, however, on what I think is an implausible reading, one were to try to shoehorn this situation into Hamilton's category (c) (on the theory that concurrent authority is impossible after passage of the congressional legislation), then any claim of sovereignty and consequent immunity is gone entirely.

---

[41] Although we have rejected a *per se* bar to state jurisdiction, it is clear that such jurisdiction remains the exception and not the rule. See *New Mexico* v. *Mescalero Apache Tribe,* 462 U. S. 324, 331–332 (1983) (footnotes omitted) ("[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members").

In sum, either the majority reads Hamilton as I do, to say nothing about sovereignty or immunity in such a case, or it will have to read him to say something about it that bars any state immunity claim. That is the dilemma of the majority's reliance on Hamilton's The Federalist No. 81, with its reference to No. 32. Either way, he is no authority for the Court's position.

Thus, the Court's attempt to convert isolated statements by the Framers into answers to questions not before them is fundamentally misguided.[42] The Court's difficulty is far more fundamental, however, than inconsistency with a particular quotation, for the Court's position runs afoul of the general theory of sovereignty that gave shape to the Framers' enterprise. An enquiry into the development of that concept demonstrates that American political thought had so revolutionized the concept of sovereignty itself that calling for the immunity of a State as against the jurisdiction of the national courts would have been sheer illogic.

---

[42] See The Federalist No. 82, p. 553 (J. Cooke ed. 1961) (A. Hamilton) (disclaiming any intent to answer all the "questions of intricacy and nicety" arising in a judicial system that must accommodate "the total or partial incorporation of a number of distinct sovereignties"); S. Elkins & E. McKitrick, The Age of Federalism 64 (1993) (suggesting that "[t]he amount of attention and discussion given to the judiciary in the Constitutional Convention was only a fraction of that devoted to the executive and legislative branches," and that the Framers deliberately left many questions open for later resolution).

2

We said in *Blatchford* v. *Native Village of Noatak,* 501 U. S. 775, 779 (1991), that "the States entered the federal system with their sovereignty intact," but we surely did not mean that they entered that system with the sovereignty they would have claimed if each State had assumed independent existence in the community of nations, for even the Articles of Confederation allowed for less than that. See Articles of Confederation, Art. VI, § 1 ("No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state . . ."). While there is no need here to calculate exactly how close the American States came to sovereignty in the classic sense prior to ratification of the Constitution, it is clear that the act of ratification affected their sovereignty in a way different from any previous political event in America or anywhere else. For the adoption of the Constitution made them members of a novel federal system that sought to balance the States' exercise of some sovereign prerogatives delegated from their own people with the principle of a limited but centralizing federal supremacy.

As a matter of political theory, this federal arrangement of dual delegated sovereign powers truly was a more revolutionary turn than the late war had been. See, *e. g., U. S. Term Limits, Inc.* v. *Thornton,* 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty").[43] Before the new federal scheme appeared, 18th-century political theorists had assumed that "there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself." B. Bailyn, The Ideological Origins of the American Revolution 198 (1967); see also Wood 345.[44] The American development of divided sovereign powers, which "shatter[ed] . . . the categories of government that had dominated Western thinking for centuries," *id.*, at 385, was made possible only by a recognition that the ultimate sovereignty rests in the people themselves. See *id.*, at 530 (noting that because "none of these arguments about 'joint jurisdictions' and 'coequal sovereignties' convincingly refuted the Antifederalist doctrine of a supreme and indivisible sovereignty," the Federalists could succeed only by emphasizing that the supreme power " '*resides* in the PEOPLE, as the fountain of government' " (citing 1 Pennsylvania and the Federal Constitution, 1787–1788, p. 302 (J. McMaster & F. Stone eds. 1888) (quoting James Wilson)).[45] The People possessing this plenary bundle of specific powers

---

[43] Regardless of its other faults, Chief Justice Taney's opinion in *Dred Scott* v. *Sandford,* 19 How. 393 (1857), recognized as a structural matter that "[t]he new Government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and

---

clothed with all the rights, and bound by all the obligations of the preceding one." *Id.*, at 441. See also F. McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 276 (1985) ("The constitutional reallocation of powers created a new form of government, unprecedented under the sun . . ."); S. Beer, To Make a Nation: The Rediscovery of American Federalism 150–151 (1993) (American view of sovereignty was "radically different" from that of British tradition).

[44] Cf., *e. g.*, 1 W. Blackstone, Commentaries 49, 160–162 (Cooper ed. 1803). This modern notion of sovereignty is traceable to the writings of Jean Bodin in the late 16th century. See J. Bodin, Six Books of the Commonwealth, bk. 2, ch. I, pp. 52–53 (M. Tooley, abr. & transl. 1967) (1576); see also T. Hobbes, Leviathan, Part II, ch. 29, pp. 150–151 (N. Fuller ed. 1952) (1651).

[45] See Wood 530 (noting that James Wilson "[m]ore boldly and fully than anyone else . . . developed the argument that would eventually become the basis of all Federalist thinking" about sovereignty); see also The Federalist No. 22, at 146 (A. Hamilton) (acknowledging the People as "that pure original fountain of all legitimate authority"); *id.*, No. 49, at 339 (J. Madison) ("[T]he people are the only legitimate fountain of power").

were free to parcel them out to different governments and different branches of the same government as they saw fit. See F. McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 278 (1985). As James Wilson emphasized, the location of ultimate sovereignty in the People meant that "[t]hey can distribute one portion of power to the more contracted circle called State governments; they can also furnish another proportion to the government of the United States." 1 Pennsylvania and the Federal Constitution, 1787–1788, *supra,* at 302.[46]

Under such a scheme, Alexander Hamilton explained, "[i]t does not follow . . . that each of the *portions* of powers delegated to [the national or state government] is not sovereign *with regard to its proper objects.*" Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, in 8 Papers of Alexander Hamilton 98 (Syrett ed. 1965) (emphasis in original).[47] A necessary consequence of this view was that "the Government of the United States has sovereign power as to its declared purposes & trusts." *Ibid.* Justice Iredell was to make the same observation in his *Chisholm* dissent, commenting that "[t]he *United States* are sovereign as to all the powers of Government actually surrendered: Each State in the *Union* is sovereign as to all the powers reserved." 2 Dall., at 435. And to the same point was Chief Justice Marshall's description of the National and State Governments as "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." *McCulloch* v. *Maryland*, 4 Wheat. 316, 410 (1819).

---

[46] See also *U. S. Term Limits, Inc.* v. *Thornton,* 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring) (the Constitution "created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it").

[47] See Amar, 96 Yale L. J., at 1434–1435 ("The ultimate American answer [to the British notion that the sovereign was by definition above the law], in part, lay in a radical redefinition of *governmental* 'sovereignty.' Just as a corporation could be delegated limited sovereign privileges by the King-in-Parliament, so governments could be delegated limited powers to govern. Within the limitations of their charters, governments could be sovereign, but that sovereignty could be bounded by the terms of the delegation itself" (footnote omitted)).

Given this metamorphosis of the idea of sovereignty in the years leading up to 1789, the question whether the old immunity doctrine might have been received as something suitable for the new world of federal-question jurisdiction is a crucial one.[48] The answer is that sovereign immunity as it would have been known to the Framers before ratification thereafter became inapplicable as a matter of logic in a federal suit raising a federal question. The old doctrine, after all, barred the involuntary subjection of a sovereign to the system of justice and law of which it was itself the font, since to do otherwise would have struck the common-law mind from the Middle Ages onward as both impractical and absurd. See, *e. g., Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353 (1907) (Holmes, J.) ("A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends").[49] But the ratification demonstrated that state governments were subject to a superior regime of law in a judicial system established, not by the State, but by the people through a specific delegation of their sovereign power to a National Government that was paramount within its delegated sphere. When individuals sued States to enforce federal rights, the Government that corresponded to the "sovereign" in the traditional common-law sense was not the State but the National Government, and any state immunity from the jurisdiction of the Nation's courts would have required a grant from the true sovereign, the people, in their Constitution, or from the Congress that the Constitution had empowered. We made a similar point in *Nevada* v. *Hall*, 440 U. S., at 416, where we considered a suit against a State in another State's courts:

---

[48] See, *e. g.*, Amar, *supra*, at 1436 ("By thus relocating true sovereignty in the People themselves . . . Americans domesticated government power and decisively repudiated British notions of 'sovereign' governmental omnipotence" (footnote omitted)). That this repudiation extended to traditional principles of sovereign immunity is clear from Justice Wilson's opinion in *Chisholm*, in which he blasted "the haughty notions of state independence, state sovereignty and state supremacy" as allowing "the state [to] assum[e] a supercilious pre-eminence above the people who have formed it." 2 Dall., at 461.

[49] See also Hobbes, *supra*, at 130 ("The sovereign of a Commonwealth, be it an assembly or one man, is not subject to the civil laws. . . . For he is free that can be free when he will: nor is it possible for any person to be bound to himself, because he that can bind can release; and therefore he that is bound to himself only is not bound"); Bodin, *supra*, at 28–29 ("One may be subject to laws made by another, but it is impossible to bind oneself in any matter which is the subject of one's own free exercise of

> "This [traditional] explanation [of sovereign immunity] adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity."

Cf. *United States* v. *Texas*, 143 U. S. 621, 646 (1892) (recognizing that a suit by the National Government against a State "does no violence to the inherent nature of sovereignty"). Subjecting States to federal jurisdiction in federal-question cases brought by individuals thus reflected nothing more than Professor Amar's apt summary that "[w]here governments are acting within the bounds of their delegated 'sovereign' power, they may partake of sovereign immunity; where

---

will. . . . It follows of necessity that the king cannot be subject to his own laws").

not, not." Amar, Of Sovereignty and Federalism, 96 Yale L. J. 1425, 1490–1491, n. 261 (1987).

State immunity to federal-question jurisdiction would, moreover, have run up against the common understanding of the practical necessity for the new federal relationship. According to Madison, the "multiplicity," "mutability," and "injustice" of then-extant state laws were prime factors requiring the formation of a new government. 1 Farrand 318–319 (remarks of J. Madison).[50] These factors, Madison wrote to Jefferson, "contributed more to that uneasiness which produced the Convention, and prepared the Public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects." 5 Writings of James Madison 27 (G. Hunt ed. 1904). These concerns ultimately found concrete expression in a number of specific limitations on state power, including provisions barring the States from enacting bills of attainder or *ex post facto* laws, coining money or emitting bills of credit, denying the privileges and immunities of out-of-staters, or impairing the obligation of contracts. But the proposed Constitution also dealt with the old problems affirmatively by granting the powers to Congress enumerated in Article I, § 8, and by providing through the Supremacy Clause that Congress could pre-empt state action in areas of concurrent state and federal authority.

Given the Framers' general concern with curbing abuses by state governments, it would be amazing if the scheme of delegated powers embodied in the Constitution had left the National Government powerless to render the States judicially accountable for violations of federal rights. And of course the Framers did not understand the scheme to leave the Government powerless. In The Federalist No. 80, at 535, Hamilton observed that "[n]o man of sense will believe that such prohibitions [running against the States] would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them," and that "an authority in the federal courts, to over-rule such as might be in manifest contravention of the articles of union" was the Convention's preferred remedy. By speaking in the plural of an authority in the federal "courts," Hamilton made it clear that he envisioned more than this Court's exercise of appellate jurisdiction to review federal questions decided by state courts. Nor is it plausible that he was thinking merely of suits brought against States by the National Government itself, which The Federalist's authors did not describe in the paternalistic terms that would pass without an eyebrow raised today. Hamilton's power of the Government to restrain violations of citizens' rights was a power to be exercised by the federal courts at the citizens' behest. See also Marshall, Fighting the Words of the Eleventh Amendment, 102 Harv. L. Rev. 1342, 1367–1371 (1989) (discussing the Framers' concern with preserving as much state accountability as possible even in the course of enacting the Eleventh Amendment).

---

[50] See also Wood 466 ("[O]nce men grasped, as they increasingly did in the middle [1780's], that reform of the national government was the best means of remedying the evils caused by the state governments, then the revision of the Articles of Confederation assumed an impetus and an importance that it had not had a few years earlier").

This sketch of the logic and objectives of the new federal order is confirmed by what we have previously seen of the preratification debate on state sovereign immunity, which in turn becomes entirely intelligible both in what it addressed and what it ignored. It is understandable that reasonable minds differed on the applicability of the immunity doctrine in suits that made it to federal court only under the original Diversity Clauses, for their features were not wholly novel. While they were, of course, in the courts of the new and, for some purposes, paramount National Government, the law that they implicated was largely the old common law (and in any case was not federal law). It was not foolish, therefore, to ask whether the old law brought the old defenses with it. But it is equally understandable that questions seem not to have been raised about state sovereign immunity in federal-question cases. The very idea of a federal question depended on the rejection of the simple concept of sovereignty from which the immunity doctrine had developed; under the English common law, the question of immunity in a system of layered sovereignty simply could not have arisen. Cf., *e. g.*, Jay II, at 1282–1284; Du Ponceau, A Dissertation on the Nature and Extent of Jurisdiction of Courts of the United States, at 6–7.[51] The Framers' principal objectives in rejecting English theories of unitary sovereignty, moreover, would have been impeded if a new concept of sovereign immunity had taken its place in federal-question cases, and would have been substantially thwarted if that new immunity had been held to be untouchable by any congressional effort to abrogate it.[52]

---

[51] Cf. Jay I, at 1033–1034 ("English common law might afford clues to the meaning of some terms in the Constitution, but the absence of any close federal model was recognized even at the Convention"); F. Coker, Commentary, in R. Pound, C. McIlwain, & R. Nichols, Federalism as a Democratic Process 81–82 (1942).

[52] See, *e. g.*, *Prout* v. *Starr*, 188 U. S. 537, 543 (1903) (acknowledging the immunity recognized in *Hans* and other cases, but observing that "[i]t would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress . . . all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations"). The majority contends that state compliance with federal law may be enforced by other means, *ante*, at 71, n. 14, but its suggestions are all pretty cold comfort: the enforcement resources of the Federal Government itself are limited; appellate review of state court decisions is contingent upon state consent to suit in state court, and is also called into question by the majority's rationale, see *supra*, at 114; and the Court's decision today illustrates

Today's majority discounts this concern. Without citing a single source to the contrary, the Court dismisses the historical evidence regarding the Framers' vision of the relationship between national and state sovereignty, and reassures us that "the Nation survived for nearly two centuries without the question of the existence of [the abrogation] power ever being presented to this Court." *Ante*, at 71.[53] But we are concerned here not with the survival of the Nation but the opportunity of its citizens to enforce federal rights in a way that Congress provides. The absence of any general federal-question statute for nearly a century following ratification of Article III (with a brief exception in 1800) hardly counts against the importance of that jurisdiction either in the Framers' conception or in current reality; likewise, the fact that Congress has not often seen fit to use its power of abrogation (outside the Fourteenth Amendment context, at least) does not compel a conclusion that the power is not important to the federal scheme. In the end, is it plausible

---

the uncertainty that the Court will always permit enforcement of federal law by suits for prospective relief against state officers. Moreover, the majority's position ignores the importance of citizen suits to enforcement of federal law. See, *e. g., Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 263 (1975) (acknowledging that, in many instances, "Congress has opted to rely heavily on private enforcement to implement public policy"); see also S. Rep. No. 94–1011, p. 2 (Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988) (recognizing that "[a]ll of these civil rights laws depend heavily upon private enforcement"); *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U. S. 711, 737 (1987) (Blackmun, J., dissenting) (noting importance of citizens' suits under federal environmental laws).

[53] The Court's further assertion, that "Congress itself waited nearly a century before even conferring federal-question jurisdiction on the lower federal courts," *ante*, at 71, is simply incorrect. As I have noted, numerous early statutes conferred federal-question jurisdiction on the federal courts operating under the original Judiciary Act in particular kinds of cases, and the Judiciary Act of 1800 provided for general federal-question jurisdiction in the brief period before its repeal in 1801. See n. 12, *supra*.

to contend that the plan of the convention was meant to leave the National Government without any way to render individuals capable of enforcing their federal rights directly against an intransigent State?

C

The considerations expressed so far, based on text, *Chisholm*, caution in common-law reception, and sovereignty theory, have pointed both to the mistakes inherent in *Hans* and, even more strongly, to the error of today's holding. Although for reasons of *stare decisis* I would not today disturb the century-old precedent, I surely would not extend its error by placing the common-law immunity it mistakenly recognized beyond the power of Congress to abrogate. In doing just that, however, today's decision declaring state sovereign immunity itself immune from abrogation in federal-question cases is open to a further set of objections peculiar to itself. For today's decision stands condemned alike by the Framers' abhorrence of any notion that such common-law rules as might be received into the new legal systems would be beyond the legislative power to alter or repeal, and by its resonance with this Court's previous essays in constitutionalizing common-law rules at the expense of legislative authority.

1

I have already pointed out how the views of the Framers reflected the caution of state constitutionalists and legislators over reception of common-law rules, a caution that the Framers exalted to the point of vigorous resistance to any idea that English common-law rules might be imported wholesale through the new Constitution. The state politicians also took pains to guarantee that once a common-law rule had been received, it would always be subject to legislative alteration, and again the state experience was reflected in the Framers' thought. Indeed, the Framers' very insistence that no common-law doctrine would be received by virtue of ratification was focused in their fear that elements of the common law might thereby have been placed beyond the power of Congress to alter by legislation.

The imperative of legislative control grew directly out of the Framers' revolutionary idea of popular sovereignty. According to one historian, "[s]hared ideas about the sovereignty of the people and the accountability of government to the people resulted at an early date in a new understanding of the role of legislation in the legal system. . . . Whereas a constitution had been seen in the colonial period as a body of vague and unidentifiable precedents and principles of common law origin that imposed ambiguous restrictions on the power of men to make or change law, after independence it came to be seen as a written charter by which the people delegated powers to various institutions of government and imposed limitations on the exercise of those powers. . . . [T]he power to modify or even entirely to repeal the common law . . . now fell explicitly within the jurisdiction of the legislature." W. Nelson, Americanization of the Common Law 90 (1975).[54]

Virtually every state reception provision, be it constitutional or statutory, explicitly provided that the common law was subject to alteration by statute. See Wood 299–300; Jones 99. The New Jersey Constitution of 1776, for instance, provided that "the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law . . . ." N. J. Const., Art. XXII (1776), in 6 W. Swindler, Sources and Documents of United States Constitutions 452 (1976).[55] Just as the early state governments did not leave reception of the common law to implication, then, neither did they receive it as law immune to legislative alteration.[56]

---

[54] Considering the example of Massachusetts, Professor Nelson observes that "the clearest illustration that legislation was coming to rest on the arbitrary power of a majoritarian legislature rather than on its conformity with past law and principle was the ease with which statutes altering common law rights were enacted and repealed in the 1780s in response to changing election results." Nelson, Americanization of the Common Law, at 91–92.

---

[55] See also Del. Const., Art. 25 (1776), in 2 Swindler, Sources and Documents of United States Constitutions, at 203 ("The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution . . ."); Act of Feb. 25, 1784, in 1 First Laws of the State of Georgia 290 (1981) (declaring "the common laws of England" to be "in full force" "so far as they are not contrary to the constitution, laws and form of government now established in this State"); Mass. Const., Ch. VI, Art. VI (1780), in 5 Swindler, *supra*, at 108 ("All the laws which have heretofore been adopted, used, and approved in the province, colony, or State of Massachusetts Bay . . . shall still remain and be in full force, until altered or repealed by the legislature . . ."); *Commonwealth* v. *Churchill*, 2 Met. 118, 123–124 (Mass. 1840) (Shaw, C. J.) (construing "laws" in this provision to include common law); N. H. Const., Part II (1784), in 6 Swindler, *supra*, at 356 ("All the laws which have heretofore been adopted, used and approved, in the province, colony, or state of New-Hampshire . . . shall remain and be in full force, until altered and repealed by the legislature . . ."); N. C. Laws 1778, Ch. V, in 1 First Laws of the State of North Carolina 353 (1984) ("[A]ll . . . such Parts of the Common Law, as were heretofore in Force and Use within this Territory . . . as are not destructive of, repugnant to, or inconsistent with the Freedom and Independence of this State, and the Form of Government therein established, and which have not been otherwise provided for, . . . not abrogated, repealed, expired, or become obsolete, are hereby declared to be in full Force within this State"); N. Y. Const., Art. XXXV (1777), in 7 Swindler, *supra*, at 177–178 ("[S]uch parts of the common law of England . . . as together did form the law of the said colony [of New York] on [April 19, 1775], shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same"); R. I. Digest of 1766, quoted in 1 R. Powell & P. Rohan, Powell On Real Property ¶ 62, p. 212 (1995) ("'[I]n all actions, causes, matters and things whatsoever, where there is no particular law of this colony, or act of parliament . . . then and in such cases the laws of England shall be in force for the decision and determination of the same'"); 2 T. Cooper, Statutes at Large of South Carolina 413 (1837) (Act of Dec. 12, 1712, § V) (receiving "the Common Law of England, where the same is not . . . inconsistent with the particular

---

constitutions, customs and laws of this Province"); S. C. Const., Art. VII (1790), in 8 Swindler, *supra*, at 480 ("All laws of force in this State at the passing of this constitution shall so continue, until altered or repealed by the legislature . . ."); W. Slade, Vermont State Papers 450 (1823) (Act of June 1782) (adopting "so much of the common law of England, as is not repugnant to the constitution or to any act of the legislature of this State"); Act of May 6, 1776, Ch. V, § VI, in First Laws of the State of Virginia 37 (1982) ("the common law of *England* . . . shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the Legislative power of this colony").

Connecticut, which did not enact any reception statute or constitutional provision, adopted the common law by judicial decision insofar as it was appropriate for local conditions. See 1 Powell & Rohan, *supra*, ¶ 52, at 140–141, and n. 77; Hall, 4 Vand. L. Rev., at 800; *Fitch* v. *Brainerd*, 2 Day 163 (Conn. 1805). Maryland's position appears to have been articulated in an oath prescribed by the Assembly in 1728 for justices of the Provincial Court. The oath required that the justices act "according to the Laws, Customs, and Directions of the Acts of Assembly of this Province; and where they are silent, according to the Laws, Statutes, and reasonable Customs of England, as have been used and practiced in this Province . . . ." M. Andrews, History of Maryland 227 (1929). Finally, although Pennsylvania's reception statute did not state that the common law could be altered by legislative enactment in so many words, it may be read as assuming the primacy of legislative enactments, see 9 Statutes at Large of Pennsylvania 29–30 (Mitchell & Flanders eds. 1903) (Act of Jan. 28, 1777) (declaring prior Acts of the general assembly to still be in force, as well as "the common law and such of the statute laws of England as have heretofore been in force in the said province . . ."), and the state assembly seems to have believed it had the power to depart from common law even prior to independence. See Warren, History of the American Bar, at 103; cf. *Kirk* v. *Dean*, 2 Binn. 341, 345 (Pa. 1810) (interpreting the state constitution as permitting departures from common-law rules where local circumstances required it).

[56] It bears emphasis that, in providing for statutory alteration of the common law, the new States were in no way departing from traditional understandings. It is true that the colonial charters had generally rendered colonial legislation void to the extent that it conflicted with English common law, but this principle was simply indicative of the Colonies' legal

I have already indicated that the Framers did not forget the state-law examples. When Antifederalists objected that the 1787 draft failed to make an explicit adoption of certain common-law protections of the individual, part of the Federalists' answer was that a general constitutional reception of the common law would bar congressional revision. Madison was particularly concerned with the necessity for legislative control, noting in a letter to George Washington that "every State has made great inroads & with great propriety on this *monarchical* code." Letter from James Madison to George Washington (Oct. 18, 1787), reprinted in 3 Farrand 130, App. A (emphasis in original).[57] Madison went on to insist that

---

subjugation to the mother country and, in any event, seldom enforced in practice. See Stoebuck, 10 Wm. & Mary L. Rev., at 396–398, 419–420. The traditional conception of the common law as it developed in England had always been that it was freely alterable by statute. T. Plucknett, A Concise History of the Common Law 336–337 (5th ed. 1956); see also T. Plucknett, Statutes and Their Interpretation in the First Half of the Fourteenth Century 26–31 (1922) (finding no historical support for the claim that common law was "fundamental" or otherwise superior to statutes). Coke appears to have attempted at one time to establish a paramount common law, see, *e. g., Dr. Bonham's Case*, 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638, 652 (C. P. 1610), but that attempt never took root in England. See Plucknett, Concise History of the Common Law, at 337; Jones 130; J. Gough, Fundamental Law in English Constitutional History 202 (1955) (observing that "[b]y the nineteenth century the overriding authority of statute-law had become the accepted principle in the courts"). And although Coke's dictum was to have a somewhat greater influence in America, that influence took the form of providing an early foundation for the idea that courts might invalidate legislation that they found inconsistent with a *written* constitution. See Jones 130–132; Gough, *supra*, at 206–207 (noting that Coke's view of fundamental law came to be transformed and subsumed in American practice by treatment of the written constitution as fundamental law in the exercise of judicial review). As I demonstrate *infra*, the idea that legislation may be struck down based on principles of common law or natural justice not located within the constitutional text has been squarely rejected in this country. See *infra*, at 165–168.

[57] See also 3 Elliot's Debates 469–470 (Edmund Randolph, Virginia Convention) (arguing that constitutional incorporation of the common law would be "destructive to republican principles"). Indeed, one reason for

"[t]he Common law is nothing more than the unwritten law, and is left by all the Constitutions equally liable to legislative alterations." *Ibid.*[58] Indeed, Madison anticipated, and rejected, the Court's approach today when he wrote that if "the common law be admitted as . . . of constitutional obligation, it would confer on the judicial department a discretion little short of a legislative power . . . [which] would be permanent and irremediable by the Legislature." Alien and Sedition Laws 380. "A discretion of this sort," he insisted, "has always been lamented as incongruous and dangerous . . . ." *Id.*, at 381.[59]

Madison's suspicion of the common law was that it included "a thousand heterogeneous & antirepublican doctrines." Letter from Madison to Washington (Oct. 18, 1787), reprinted in 3 Farrand 130, App. A. "[I]t will merit the most profound consideration," Madison was later to warn in his Report on the Virginia Resolutions Concerning the Alien and Sedition Laws, "how far an indefinite admission of the common law . . . might draw after it the various prerogatives making part of the unwritten law of England." Alien and Sedition Laws 380. Such an admission, Madison feared, would mean that "the whole code, with all its incongruities, barbarisms, and bloody maxims, would be inviolably saddled on the good people of the United States." *Ibid.* See also Amar, 96 Yale L. J., at 1490 ("[The] sole basis [of absolute government immunity from all suits] is the British idea that the sovereign government, as the source of all law, cannot itself be bound by any law absent its consent. . . . [L]iterally every article of the Federalist Constitution and every amendment in the Bill of Rights rests on the repudiation of the British view" (footnote omitted)).

[58] See Wood 304, n. 75 ("To Jefferson in 1785 judicial discretion in the administration of justice was still the great evil and codification the great remedy"); G. White, The Marshall Court and Cultural Change, 1815–1835, p. 130 (1991) ("[A]n assumption of the constitutional design was that if Congress exercised [its enumerated] powers through legislation, its laws would supersede any competing ones").

[59] The Court attempts to sidestep this history by distinguishing sovereign immunity as somehow different from other common-law principles. *Ante*, at 69. But see *Chisholm* v. *Georgia*, 2 Dall., at 435 (Iredell, J., dissenting) (arguing that the common law of England should control the case "so far as it is applicable to the peculiar circumstances of the country, and where no special act of Legislation controuls it"). The Court cannot find solace in any distinction between "substantive rules of law" and "ju-

2

History confirms the wisdom of Madison's abhorrence of constitutionalizing common-law rules to place them beyond the reach of congressional amendment. The Framers feared judicial power over substantive policy and the ossification of law that would result from transforming common law into constitutional law, and their fears have been borne out every time the Court has ignored Madison's counsel on subjects that we generally group under economic and social policy. It is, in fact, remarkable that as we near the end of this

---

risdiction," *ante*, at 69, however; it is abundantly clear that we have drawn both sorts of principles from the common law. See, *e. g.*, *Burnham* v. *Superior Court of Cal., County of Marin*, 495 U. S. 604, 609 (1990) (plurality opinion of SCALIA, J.) (noting that American notion of personal jurisdiction is a "common-law principle" that predates the Fourteenth Amendment). Nothing in the history, moreover, suggests that common-law rules were more immutable when they were jurisdictional rather than substantive in nature. Nor is it true that "the principle of state sovereign immunity stands distinct from other principles of the common law in that only the former prompted a specific constitutional amendment." *Ante*, at 69. The Seventh Amendment, after all, was adopted to respond to Antifederalist concerns regarding the right to jury trial. See n. 34, *supra*. Indeed, that Amendment vividly illustrates the distinction between provisions intended to adopt the common law (the Amendment specifically mentions the "common law" and states that the common-law right "shall be preserved") and those provisions, like the Eleventh Amendment, that may have been inspired by a common-law right but include no language of adoption or specific reference. Finally, the Court's recourse to a vague "jurisprudence in all civilized nations," *ante*, at 69, rather than the common law of England is unavailing. When the Constitution has received such general principles into our law, for example, in the Admiralty Clause's adoption of the general "law of nations" or "law of the sea," those principles have always been subject to change by congressional enactment. See, *e. g.*, *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 386 (1924) (noting that although "the principles of the general maritime law, sometimes called the law of the sea," were "embodied" in Art. III, §2, of the Constitution, they remained "subject to power in Congress to alter, qualify or supplement"); *The Nereide*, 9 Cranch 388, 423 (1815) (Marshall, C. J.) (stating that the Court would be "bound by the law of nations" until Congress passed a contrary enactment).

century the Court should choose to open a new constitutional chapter in confining legislative judgments on these matters by resort to textually unwarranted common-law rules, for it was just this practice in the century's early decades that brought this Court to the nadir of competence that we identify with *Lochner* v. *New York*, 198 U. S. 45 (1905).[60]

It was the defining characteristic of the *Lochner* era, and its characteristic vice, that the Court treated the common-law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic matters as constitutionally suspect. See, *e. g., Adkins* v. *Childrens Hospital of D. C.*, 261 U. S. 525, 557 (1923) (finding abrogation of common-law freedom to contract for any wage an unconstitutional "compulsory exaction"); see generally Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873 (1987). And yet the superseding lesson that seemed clear after *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937), that action within the legislative power is not subject to greater scrutiny merely because it trenches upon the case law's ordering of economic and social relationships, seems to have been lost on the Court.

The majority today, indeed, seems to be going *Lochner* one better. When the Court has previously constrained the express Article I powers by resort to common-law or background principles, it has done so at least in an ostensible effort to give content to some other written provision of the Constitution, like the Due Process Clause, the very object of which is to limit the exercise of governmental power. See, *e. g., Adair* v. *United States,* 208 U. S. 161 (1908). Some textual argument, at least, could be made that the Court was doing no more than defining one provision that happened to be at odds with another. Today, however, the Court is not struggling to fulfill a responsibility to reconcile two arguably conflicting and Delphic constitutional provisions, nor is it struggling with any Delphic text at all. For even the Court concedes that the Constitution's grant to Congress of plenary power over relations with Indian tribes at the expense of any state claim to the contrary is unmistakably clear, and this case does not even arguably implicate a textual trump to the grant of federal-question jurisdiction.

---

[60] Cf. *United States* v. *Lopez*, 514 U. S. 549, 606 (1995) (SOUTER, J., dissenting) ("The fulcrums of judicial review in [the *Lochner* cases] were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the first third of the century showed itself in exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them").

I know of only one other occasion on which the Court has spoken of extending its reach so far as to declare that the plain text of the Constitution is subordinate to judicially discoverable principles untethered to any written provision. Justice Chase once took such a position almost 200 years ago:

> "There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power. . . . An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Calder* v. *Bull,* 3 Dall. 386, 388 (1798) (emphasis deleted).

This position was no less in conflict with American constitutionalism in 1798 than it is today, being inconsistent with the Framers' view of the Constitution as fundamental law. Justice Iredell understood this, and dissented (again) in an opinion that still answers the position that "vital" or "background" principles, without more, may be used to confine a clear constitutional provision:

> "[S]ome speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I

> cannot think that, under such a government, any Court of Justice would possess a power to declare it so. . . .
>
> ". . . [I]t has been the policy of the American states, . . . and of the people of the United States . . . to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void. . . . If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." *Id.*, at 398–399 (emphasis deleted) (opinion dissenting in part).

Later jurisprudence vindicated Justice Iredell's view, and the idea that "first principles" or concepts of "natural justice" might take precedence over the Constitution or other positive law "all but disappeared in American discourse." J. Ely, Democracy and Distrust 52 (1980). It should take more than references to "background principle[s]," *ante*, at 72, and "implicit limitation[s]," *Welch*, 483 U. S., at 496 (SCALIA, J., concurring in part and concurring in judgment), to revive the judicial power to overcome clear text unopposed to any other provision, when that clear text is in harmony with an almost equally clear intent on the part of the Framers and the constitutionalists of their generation.

IV

The Court's holding that the States' *Hans* immunity may not be abrogated by Congress leads to the final question in this case, whether federal-question jurisdiction exists to order prospective relief enforcing IGRA against a state officer, respondent Chiles, who is said to be authorized to take the action required by the federal law. Just as with the issue about authority to order the State as such, this question is entirely jurisdictional, and we need not consider here whether petitioner Seminole Tribe would have a meritorious argument for relief, or how much practical relief the requested order (to bargain in good faith) would actually provide to the Tribe. Nor, of course, does the issue turn in any way on one's views about the scope of the Eleventh Amendment or *Hans* and its doctrine, for we ask whether the state officer is subject to jurisdiction only on the assumption that action directly against the State is barred. The answer to this question is an easy yes, the officer is subject to suit under the rule in *Ex parte Young*, 209 U. S. 123 (1908), and the case could, and should, readily be decided on this point alone.

A

In *Ex parte Young*, this Court held that a federal court has jurisdiction in a suit against a state officer to enjoin official actions violating federal law, even though the State itself may be immune. Under *Young*, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern* v. *Jordan*, 440 U. S. 332, 337 (1979); see also *Milliken* v. *Bradley*, 433 U. S. 267, 289 (1977).

The fact, without more, that such suits may have a significant impact on state governments does not count under *Young*. *Milliken*, for example, was a suit, under the authority of *Young*, brought against Michigan's Governor, Attorney General, Board of Education, Superintendent of Public Instruction, and Treasurer, which resulted in an order obligating the State of Michigan to pay money from its treasury to fund an education plan. The relief requested (and obtained) by the plaintiffs effectively ran against the State: state moneys were to be removed from the state treasury, and they were to be spent to fund a remedial education program that it would be the State's obligation to implement. To take another example, *Quern* v. *Jordan* involved a court order requiring state officials to notify welfare beneficiaries of the availability of past benefits. Once again, the defendants were state officials, but it was the obligation of the State that was really at issue: the notices would be sent from the state welfare agency, to be returned to the state agency, and the state agency would pay for the notices and any ensuing awards of benefits. Indeed, in the years since *Young* was decided, the Court has recognized only one limitation on the scope of its doctrine: under *Edelman* v. *Jordan*, 415 U. S. 651 (1974), *Young* permits prospective relief only and may not be applied to authorize suits for retrospective monetary relief.

It should be no cause for surprise that *Young* itself appeared when it did in the national law. It followed as a matter of course after the *Hans* Court's broad recognition of immunity in federal-question cases, simply because "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U. S. 64, 68 (1985). *Young* provided, as it does today, a sensible way to reconcile the Court's expansive view of immunity expressed in *Hans* with the principles embodied in the Supremacy Clause and Article III.

If *Young* may be seen as merely the natural consequence of *Hans*, it is equally unsurprising as an event in the longer history of sovereign immunity doctrine, for the rule we speak of under the name of *Young* is so far inherent in the jurisdictional limitation imposed by sovereign immunity as to have been recognized since the Middle Ages. For that long it has been settled doctrine that suit against an officer of the Crown permitted relief against the government despite the Crown's immunity from suit in its own courts and the maxim that the King could do no wrong. See Jaffe, 77 Harv. L. Rev., at 3, 18–19; Ehrlich, No. XII: Proceedings Against the Crown (1216–1377), pp. 28–29, in 6 Oxford Studies in Social and Legal History (P. Vinogradoff ed. 1921). An early example, from "time immemorial" of a claim "affecting the Crown [that] could be pursued in the regular courts [without consent since it] did not take the form of a suit against the Crown," Jaffe, *supra,* at 1, was recognized by the Statute of Westminster I, 1275, which established a writ of disseisin against a King's officers. When a King's officer disseised any person in the King's name, the wrongfully deprived party could seek the draconian writ of attaint against the officer, by which he would recover his land. Jaffe, 77 Harv. L. Rev., at 9. Following this example forward, we may see how the writ of attaint was ultimately overtaken by the more moderate common-law writs of certiorari and mandamus, "operat[ing] directly on the government; [and commanding] an officer not as an individual but as a functionary." *Id.,* at 16. Thus the Court of King's Bench made it clear in 1701 that "wherever any new jurisdiction is erected, be it by private or public Act of Parliament, they are subject to the inspections of this Court by writ of error, or by *certiorari* and *mandamus.*" *The Case of Cardiffe Bridge,* 1 Salk. 146, 91 Eng. Rep. 135 (K. B.).

B

This history teaches that it was only a matter of course that once the National Constitution had provided the opportunity for some recognition of state sovereign immunity, the necessity revealed through six centuries or more of history would show up in suits against state officers, just as *Hans* would later open the door to *Ex parte Young* itself. Once, then, the Eleventh Amendment was understood to forbid suit against a State *eo nomine*, the question arose "which suits against officers will be allowed and which will not be." Jaffe, 77 Harv. L. Rev., at 20.

> "It early became clear that a suit against an officer was not forbidden simply because it raised a question as to the legality of his action as an agent of government or because it required him, as in mandamus, to perform an official duty. These as we know had been well established before the eleventh amendment as not necessarily requiring consent. To be sure the renewed emphasis on immunity given by the eleventh amendment might conceivably have been taken so to extend the doctrine as to exclude suits against state officers even in cases where the English tradition would have allowed them. There was a running battle as to where the line would be drawn. The amendment was appealed to as an argument for generous immunity. But there was the vastly powerful counterpressure for the enforcement of constitutional limits on the states. The upshot . . . was to confine the amendment's prohibition more or less to the occasion which gave it birth, to wit, the enforcement of contracts and to most (though not all) suits involving the title and disposition of a state's real and personal property." *Id.*, at 20–21.

The earliest cases, *United States* v. *Peters*, 5 Cranch 115 (1809), and *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824), embrace the English practice of permitting suits against officers, see Orth, Judicial Power of the United States, at 34–35, 40–41, 122, by focusing almost exclusively on whether the State had been named as a defendant. *Governor of Georgia* v. *Madrazo*, 1 Pet. 110, 123–124 (1828), shifted this analysis somewhat, finding that a Governor could not be sued because he was sued "not by his name, but by his title," which was thought the functional equivalent of suing the State itself. *Madrazo* did not, however, erase the fundamental principle of *Osborn* that sovereign immunity would not bar a suit against a state officer. See, *e. g., Davis* v. *Gray,* 16 Wall. 203 (1873) (applying *Osborn* by enjoining the Governor of Texas to interfere with the possession of land granted by the State); *United States* v. *Lee,* 106 U. S. 196 (1882) (applying *Osborn* in context of federal sovereign immunity).

This simple rule for recognizing sovereign immunity without gutting substantial rights was temporarily muddled in *Louisiana* v. *Jumel,* 107 U. S. 711 (1883), where the Court, although it "did not clearly say why," refused to hear a suit that would have required a state treasurer to levy taxes to pay interest on a bond. Currie, Sovereign Immunity and Suits Against Government Officers, 1984 S. Ct. Rev. 149, 152. (One recalls the circumstances of *Hans* itself, see *supra,* at 117–121.) The Court, however, again applied *Osborn* in the *Virginia Coupon Cases,* 114 U. S. 269 (1885) (permitting injunctions, restitution, and damages against state officers who seized property to collect taxes already paid with interest coupons the State had agreed to accept). *In re Ayers,* 123 U. S. 443, 502 (1887), sought to rationalize the competing strands of doctrine on the ground that an action may be "sustained only in those instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character."

Ex parte Young restored the old simplicity by complementing *In re Ayers* with the principle that state officers never have authority to violate the Constitution or federal law, so that any illegal action is stripped of state character and rendered an illegal individual act. Suits against these officials are consequently barred by neither the Eleventh Amendment nor *Hans* immunity. The officer's action "is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. . . . The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Ex parte Young,* 209 U. S., at 159–160.

The decision in *Ex parte Young,* and the historic doctrine it embodies, thus plays a foundational role in American constitutionalism, and while the doctrine is sometimes called a "fiction," the long history of its felt necessity shows it to be something much more estimable, as we may see by considering the facts of the case. "Young was really and truly about to damage the interest of plaintiffs. Whether what he was about to do amounted to a legal injury depended on the authority of his employer, the state. If the state could constitutionally authorize the act then the loss suffered by plaintiffs was not a wrong for which the law provided a remedy. . . . If the state could not constitutionally authorize the act then Young was not acting by its authority." Orth, Judicial Power of the United States, at 133. The doctrine we call *Ex parte Young* is nothing short of "indispensable to the establishment of constitutional government and the rule of law." C. Wright, Law of Federal Courts 292 (4th ed. 1983). See also Chemerinsky, Federal Jurisdiction, at 393.

A rule of such lineage, engendered by such necessity, should not be easily displaced, if indeed it is displaceable at all, for it marks the frontier of the enforceability of federal law against sometimes competing state policies. We have in fact never before inferred a congressional intent to eliminate this time-honored practice of enforcing federal law. That, of course, does not mean that the intent may never be inferred, and where, as here, the underlying right is one of statutory rather than constitutional dimension, I do not in theory reject the Court's assumption that Congress may bar enforcement by suit even against a state official. But because in practice, in the real world of congressional legislation, such an intent would be exceedingly odd, it would be equally odd for this Court to recognize an intent to block the customary application of *Ex parte Young* without applying the rule recognized in our previous cases, which have insisted on a clear statement before assuming a congressional purpose to "affec[t] the federal balance," *United States* v. *Bass,* 404 U. S. 336, 349 (1971). See also *Will* v. *Michigan Dept. of State Police,* 491 U. S. 58, 65 (1989) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute' ") (quoting *Atascadero State Hospital* v. *Scanlon,* 473 U. S., at 242); *Gregory* v. *Ashcroft,* 501 U. S. 452, 460–461 (1991). Our habitual caution makes sense for just the reason we mentioned in *Dellmuth* v. *Muth,* 491 U. S., at 230–231: it is "difficult to believe that . . . Congress, taking careful stock of the state of Eleventh Amendment law, decided it would drop coy hints but stop short of making its intention manifest."

C

There is no question that by its own terms *Young*'s indispensable rule authorizes the exercise of federal jurisdiction over respondent Chiles. Since this case does not, of course, involve retrospective relief, *Edelman*'s limit is irrelevant, and there is no other jurisdictional limitation. Obviously, for jurisdictional purposes it makes no difference in principle whether the injunction orders an official not to act, as in *Young,* or requires the official to take some positive step, as in *Milliken* or *Quern.* Nothing, then, in this case renders *Young* unsuitable as a jurisdictional basis for determining on the merits whether petitioner is entitled to an order against a state official under general equitable doctrine. The Court does not say otherwise, and yet it refuses to apply *Young.* There is no adequate reason for its refusal.

No clear statement of intent to displace the doctrine of *Ex parte Young* occurs in IGRA, and the Court is instead constrained to rest its effort to skirt *Young* on a series of suggestions thought to be apparent in Congress's provision of "intricate procedures" for enforcing a State's obligation under the Act. The procedures are said to implicate a rule against judicial creativity in devising supplementary procedures; it is said that applying *Young* would nullify the statutory procedures; and finally the statutory provisions are said simply to reveal a congressional intent to preclude the application of *Young.*

1

The Court cites *Schweiker* v. *Chilicky,* 487 U. S. 412, 423 (1988), in support of refraining from what it seems to think would be judicial creativity in recognizing the applicability of *Young.* The Court quotes from *Chilicky* for the general proposition that when Congress has provided what it considers adequate remedial mechanisms for violations of federal law, this Court should not "creat[e]" additional remedies. *Ante,* at 74. The Court reasons that Congress's provision in IGRA of "intricate procedures" shows that it considers its remedial provisions to be adequate, with the implication that courts as a matter of prudence should provide no "additional" remedy under *Ex parte Young. Ante,* at 73–76.

Chilicky's remoteness from the point of this case is, however, apparent from its facts. In *Chilicky,* Congress had addressed the problem of erroneous denials of certain government benefits by creating a scheme of appeals and awards that would make a successful claimant whole for all benefits wrongly denied. The question was whether this Court should create a further remedy on the model of *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), for such harms as emotional distress, when the erroneous denial of benefits had involved a violation of procedural due process. The issue, then, was whether to create a supplemental remedy, backward looking on the *Bivens* model, running against a federal official in his personal capacity, and requiring an affirmative justification (as *Bivens* does). See *Bivens, supra; FDIC* v. *Meyer*, 510 U. S. 471, 484–486 (1994).

The *Bivens* issue in *Chilicky* (and in *Meyer*) is different from the *Young* issue here in every significant respect. *Young* is not an example of a novel rule that a proponent has a burden to justify affirmatively on policy grounds in every context in which it might arguably be recognized; it is a general principle of federal equity jurisdiction that has been recognized throughout our history and for centuries before our own history began. *Young* does not provide retrospective monetary relief but allows prospective enforcement of federal law that is entitled to prevail under the Supremacy Clause. It requires not money payments from a government employee's personal pocket, but lawful conduct by a public employee acting in his official capacity. *Young* would not function here to provide a merely supplementary regime of compensation to deter illegal action, but the sole jurisdictional basis for an Article III court's enforcement of a clear federal statutory obligation, without which a congressional act would be rendered a nullity in a federal court. One cannot intelligibly generalize from *Chilicky*'s standards for imposing the burden to justify a supplementary scheme of tort law to the displacement of *Young*'s traditional and indispensable jurisdictional basis for ensuring official compliance with federal law when a State itself is immune from suit.

2

Next, the Court suggests that it may be justified in displacing *Young* because *Young* would allow litigants to ignore the "intricate procedures" of IGRA in favor of a menu of streamlined equity rules from which any litigant could order as he saw fit. But there is no basis in law for this suggestion, and the strongest authority to reject it. *Young* did not establish a new cause of action and it does not impose any particular procedural regime in the suits it permits. It stands, instead, for a jurisdictional rule by which paramount federal law may be enforced in a federal court by substituting a nonimmune party (the state officer) for an immune one (the State itself). *Young* does no more and furnishes no authority for the Court's assumption that it somehow pre-empts procedural rules devised by Congress for particular kinds of cases that may depend on *Young* for federal jurisdiction.[61]

If, indeed, the Court were correct in assuming that Congress may not regulate the procedure of a suit jurisdictionally dependent on *Young,* the consequences would be revolutionary, for example, in habeas law. It is well established that when a habeas corpus petitioner sues a state official alleging detention in violation of federal law and seeking the prospective remedy of release from custody, it is the doctrine identified in *Ex parte Young* that allows the petitioner to evade the jurisdictional bar of the Eleventh Amendment (or, more properly, the *Hans* doctrine). See *Young,* 209 U. S., at 167–168; *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 689–690 (1949).[62] And yet Congress has imposed a number of restrictions upon the habeas remedy, see, *e. g.*, 28 U. S. C. § 2254(b) (requiring exhaustion of state remedies prior to bringing a federal habeas petition), and this Court has articulated several more, see, *e. g.*, *McCleskey* v. *Zant*, 499 U. S. 467 (1991) (abuse of the writ); *Teague* v. *Lane*, 489 U. S. 288 (1989) (limiting applicability of "new rules" on habeas); *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993) (applying a more deferential harmless-error standard on habeas review). By suggesting that *Ex parte Young* provides a free-standing remedy not subject to the restrictions otherwise imposed on federal remedial schemes (such as habeas corpus), the Court suggests that a state prisoner may circumvent these restrictions by ostensibly bringing his suit under *Young* rather than 28 U. S. C. § 2254. The Court's view implies similar consequences under any number of similarly structured federal statutory schemes.[63]

---

[61] The Court accuses me of misrepresenting its argument. *Ante,* at 75, n. 17. The Court's claim, as I read it, is not that Congress cannot authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme, but rather that remedial limitations on the underlying cause of action do not apply to a claim based on *Ex parte Young.* Otherwise, the existence of those remedial limitations would provide no reason for the Court to assume that Congress did not intend to permit an action under *Young;* rather, the limitations would apply regardless of whether the suit was brought against the State or a state officer.

[62] See also *Brennan* v. *Stewart,* 834 F. 2d 1248, 1252, n. 6 (CA5 1988) ("[A]lthough not usually conceptualized as *Ex parte Young* cases, most of the huge number of habeas claims in the federal courts under 28 U. S. C. § 2254 are effectively suits against the states. These suits pass muster under the Eleventh Amendment because the habeas theory of a civil suit against the bad jailer fits perfectly with the *Ex parte Young* fiction"); *United States ex rel. Elliott* v. *Hendricks,* 213 F. 2d 922, 926–928 (CA3) (exercising jurisdiction over a habeas suit despite an Eleventh Amendment challenge on the theory that the suit was against a state officer), cert. denied, 348 U. S. 851 (1954).

This, of course, cannot be the law, and the plausible rationale for rejecting the Court's contrary assumption is that Congress has just as much authority to regulate suits when jurisdiction depends on *Young* as it has to regulate when *Young* is out of the jurisdictional picture. If *Young* does not preclude Congress from requiring state exhaustion in habeas cases (and it clearly does not), then *Young* does not bar the application of IGRA's procedures when effective relief is sought by suing a state officer.

3

The Court's third strand of reasoning for displacing *Ex parte Young* is a supposed inference that Congress so intended. Since the Court rests this inference in large part on its erroneous assumption that the statute's procedural limitations would not be applied in a suit against an officer for which *Young* provided the jurisdictional basis, the error of that assumption is enough to show the unsoundness of any inference that Congress meant to exclude *Young*'s application. But there are further reasons pointing to the utter implausibility of the Court's reading of the congressional mind.

---

[63] Many other federal statutes impose obligations on state officials, the enforcement of which is subject to "intricate provisions" also statutorily provided. See, *e. g.*, Federal Water Pollution Control Act, 33 U. S. C. § 1365(a) (citizen-suit provision to enforce States' obligations under federal environmental law); Emergency Planning and Community Right-To-Know Act, 42 U. S. C. § 11001 (privately enforceable requirement that States form commissions, appointed by the Governor, to generate plans for addressing hazardous material emergencies).

IGRA's jurisdictional provision reads as though it had been drafted with the specific intent to apply to officer liability under *Young.* It provides that "[t]he United States district courts shall have jurisdiction over . . . any cause of action . . . *arising from the failure of a State* to enter into negotiations . . . or to conduct such negotiations in good faith." 25 U. S. C. § 2710(d)(7)(A)(i) (emphasis added). This language does not limit the possible defendants to States and is quite literally consistent with the possibility that a tribe could sue an appropriate state official for a State's failure to negotiate.[64] The door is so obviously just as open to jurisdiction over an officer under *Young* as to jurisdiction over a State directly that it is difficult to see why the statute would have been drafted as it was unless it was done in anticipation that *Young* might well be the jurisdictional basis for enforcement action.

But even if the jurisdictional provision had spoken narrowly of an action against the State itself (as it subsequently speaks in terms of the State's obligation), that would be no indication that Congress had rejected the application of *Young.* An order requiring a "State" to comply with federal law can, of course, take the form of an order directed to the State in its sovereign capacity. But as *Ex parte Young* and innumerable other cases show, there is nothing incongruous about a duty imposed on a "State" that Congress intended to be effectuated by an order directed to an appropriate state official. The habeas corpus statute, again, comes to mind. It has long required "the State," by "order directed to an appropriate State official," to produce the state-court record where an indigent habeas petitioner argues that a state court's factual findings are not fairly supported in the record. See 28 U. S. C. § 2254(e) ("the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official"). If, then, IGRA's references to "a State's" duty were not enforceable by order to a state official, it would have to be for some other reason than the placement of the statutory duty on "the State."

---

[64] In order for any person (whether individual or entity) to be a proper defendant under § 2710(d)(7) (and in order for standing to exist, since one of its requirements is redressability), that person, of course, would need to have some connection to the State's negotiations. See *Young,* 209 U. S., at 157; *Franklin* v. *Massachusetts,* 505 U. S. 788, 803 (1992). The obvious candidates are the responsible state officials.

It may be that even the Court agrees, for it falls back to the position, see *ante*, at 75, n. 17, that only a State, not a state officer, can enter into a compact. This is true but wholly beside the point. The issue is whether negotiation should take place as required by IGRA and an officer (indeed, only an officer) can negotiate. In fact, the only case cited by the Court, *State ex rel. Stephan* v. *Finney*, 251 Kan. 559, 836 P. 2d 1169 (1992), makes that distinction abundantly clear.

Finally, one must judge the Court's purported inference by stepping back to ask why Congress could possibly have intended to jeopardize the enforcement of the statute by excluding application of *Young*'s traditional jurisdictional rule, when that rule would make the difference between success or failure in the federal court if state sovereign immunity was recognized. Why would Congress have wanted to go for broke on the issue of state immunity in the event the State pleaded immunity as a jurisdictional bar? Why would Congress not have wanted IGRA to be enforced by means of a traditional doctrine giving federal courts jurisdiction over state officers, in an effort to harmonize state sovereign immunity with federal law that is paramount under the Supremacy Clause? There are no plausible answers to these questions.

D

There is, finally, a response to the Court's rejection of *Young* that ought to go without saying. Our longstanding practice is to read ambiguous statutes to avoid constitutional infirmity, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 575 (1988) ("'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality'") (quoting *Hooper* v. *California,* 155 U. S. 648, 657 (1895)). This practice alone (without any need for a clear statement to displace *Young*) would be enough to require *Young*'s application. So, too, would the application of another rule, requiring courts to choose any reasonable construction of a statute that would eliminate the need to confront a contested constitutional issue (in this case, the place of state sovereign immunity in federal-question cases and the status of *Union Gas*). *NLRB* v. *Catholic Bishop of Chicago,* 440 U. S. 490, 500–501 (1979). Construing the statute to harmonize with *Young,* as it readily does, would have saved an Act of Congress and rendered a discussion on constitutional grounds wholly unnecessary. This case should be decided on this basis alone.

V

Absent the application of *Ex parte Young,* I would, of course, follow *Union Gas* in recognizing congressional power under Article I to abrogate *Hans* immunity. Since the reasons for this position, as explained in Parts II–III, *supra,* tend to unsettle *Hans* as well as support *Union Gas,* I should add a word about my reasons for continuing to accept *Hans*'s holding as a matter of *stare decisis.*

The *Hans* doctrine was erroneous, but it has not previously proven to be unworkable or to conflict with later doctrine or to suffer from the effects of facts developed since its decision (apart from those indicating its original errors). I would therefore treat *Hans* as it has always been treated in fact until today, as a doctrine of federal common law. For, as so understood, it has formed one of the strands of the federal relationship for over a century now, and the stability of that relationship is itself a value that *stare decisis* aims to respect.

In being ready to hold that the relationship may still be altered, not by the Court but by Congress, I would tread the course laid out elsewhere in our cases. The Court has repeatedly stated its assumption that insofar as the relative positions of States and Nation may be affected consistently with the Tenth Amendment,[65] they would not be modified without deliberately expressed intent. See *Gregory* v. *Ashcroft*, 501 U. S., at 460–461. The plain-statement rule, which "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision," *United States* v. *Bass*, 404 U. S., at 349, is particularly appropriate in light of our primary reliance on "[t]he effectiveness of the federal political process in preserving the States' interests," *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 552 (1985).[66] Hence, we have required such a plain statement when Congress preempts the historic powers of the States, *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947), imposes a condition on the grant of federal moneys, *South Dakota* v. *Dole*, 483 U. S. 203, 207 (1987), or seeks to regulate a State's ability to determine the qualifications of its own officials, *Gregory*, *supra*, at 464.

---

[65] The scope of the Tenth Amendment's limitations of congressional power remains a subject of debate. *New York* v. *United States*, 505 U. S. 144 (1992), holds that principles of federalism are "violated by a formal command from the National Government directing the State to enact a certain policy." *United States* v. *Lopez*, 514 U. S., at 583 (KENNEDY, J., concurring). Some suggest that the prohibition extends further than barring the Federal Government from directing the creation of state law. The views I express today should not be understood to take a position on that disputed question.

[66] See also The Federalist No. 46, at 319 (J. Madison) (explaining that the Federal Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the pre-

When judging legislation passed under unmistakable Article I powers, no further restriction could be required. Nor does the Court explain why more could be demanded. In the past, we have assumed that a plain-statement requirement is sufficient to protect the States from undue federal encroachments upon their traditional immunity from suit. See, *e. g.*, *Welch* v. *Texas Dept. of Highways & Public Transp.*, 483 U. S., at 475; *Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 239–240. It is hard to contend that this rule has set the bar too low, for (except in *Union Gas*) we have never found the requirement to be met outside the context of laws passed under § 5 of the Fourteenth Amendment. The exception I would recognize today proves the rule, moreover, because the federal abrogation of state immunity comes as part of a regulatory scheme which is itself designed to invest the States with regulatory powers that Congress need not extend to them. This fact suggests to me that the political safeguards of federalism are working, that a plain-statement rule is an adequate check on congressional overreaching, and that today's abandonment of that approach is wholly unwarranted.

There is an even more fundamental "clear statement" principle, however, that the Court abandons today. John Marshall recognized it over a century and a half ago in the very context of state sovereign immunity in federal-question cases:

---

rogatives of their governments"); Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954).

> "The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed." *Cohens* v. *Virginia*, 6 Wheat., at 379–380.

Because neither text, precedent, nor history supports the majority's abdication of our responsibility to exercise the jurisdiction entrusted to us in Article III, I would reverse the judgment of the Court of Appeals.

MORSE ET AL. *v.* REPUBLICAN PARTY OF VIRGINIA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

No. 94–203. Argued October 2, 1995—Decided March 27, 1996

Appellee Republican Party of Virginia (Party) invited all registered Virginia voters willing to declare their support for the Party's nominees at the 1994 general election to become delegates to a convention to nominate the Party's candidate for United States Senator upon payment of a registration fee. Appellants Bartholomew and Enderson desired, and were qualified, to become delegates, but were rejected because they refused to pay the fee; appellant Morse paid the fee with funds advanced by supporters of the eventual nominee. Alleging, *inter alia*, that the imposition of the fee violated §§ 5 and 10 of the Voting Rights Act of 1965, appellants filed a complaint seeking an injunction preventing the Party from imposing the fee and ordering it to return the fee paid by Morse. The three-judge District Court convened to consider the § 5 and § 10 claims granted the Party's motion to dismiss, concluding that the "general rule" that § 5 covers political parties to the extent that they are empowered to conduct primary elections is inapplicable to the selection of nominating convention delegates under a regulation promulgated by the Attorney General of the United States and under this Court's summary decision in *Williams* v. *Democratic Party of Georgia*, 409 U. S. 809; and that only the Attorney General has authority to enforce § 10.

Held: The judgment is reversed, and the case is remanded.

853 F. Supp. 212, reversed and remanded.

JUSTICE STEVENS, joined by JUSTICE GINSBURG, concluded:

1. The Party's decision to exact the registration fee was subject to § 5, which, among other things, prohibits Virginia and other covered jurisdictions from enacting or enforcing "any voting qualification or prerequisite . . . different from that in force . . . on" a specified date unless the change has been precleared by the Attorney General. Pp. 193–229.

(a) The District Court erred in its application of the Attorney General's regulation, which unambiguously requires § 5 preclearance when a political party makes a change affecting voting if, *inter alia*, the party is "acting under authority explicitly or implicitly granted by a covered jurisdiction." Because Virginia law provides that the nominees of the two major political parties shall automatically appear on the general election ballot, without the need to declare their candidacy or to demonstrate their support with a nominating petition, and authorizes the two parties to determine for themselves how they will select their nominees, whether by primary, nominating convention, or some other method, the Party "act[ed] under authority" of Virginia when it picked its candidate at the convention and certified the nominee for automatic placement on the general election ballot. Cf. *Smith* v. *Allwright*, 321 U. S. 649, 653, n. 6, 660, 663. Because the conclusion that the Party's activities fall directly within the regulation's scope is not contradicted, but is in fact supported, by this Court's narrow holding in *Williams*, *supra*, the District Court also erred when it based its dismissal of appellants' complaint on that case. Pp. 194–203.

(b) The Act's language and structure compel the conclusion that § 5 of its own force covers changes such as the Party's filing fee when the electoral practice at issue is a nominating convention. This Court has consistently construed the Act to require preclearance of any change bearing on the "effectiveness" of a vote cast in a primary, special, or general election, including changes in the composition of the electorate that votes for a particular office. See, *e. g.*, *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 570. By limiting the opportunity for voters to participate in the convention, the Party's filing fee undercuts their influence on the field of candidates whose names will appear on the ballot, and thus weakens the "effectiveness" of their votes cast in the general election itself. That § 5 covers nonprimary nomination methods is also supported by *Whitley* v. *Williams*, decided with *Allen*, *supra;* by the text and legislative history of § 14, which defines the terms "vote" or "voting" to include "all action necessary to make a vote effective in any . . . election," including the selection of persons for "party office"; and by the text of § 2, which bans any racially discriminatory voting qualification or prerequisite if "*the political processes leading to nomination or election* . . . are not equally open to . . . [protected group] members." (Emphasis added.) Pp. 203–210.

(c) Consideration of the historical background which informed the 89th Congress when it passed the Act—particularly *Terry* v. *Adams*, 345 U. S. 461, and the other "White Primary Cases," in which the Court applied the Fifteenth Amendment to strike down a succession of measures by Texas authorities to exclude minority voters from their nomination processes—confirms the conclusion that § 5 applies here. None of the reasons offered to support appellees' contention that the White Primary Cases have no bearing on the Act's proper interpretation—(1) that the Party's convention did not operate in a racially discriminatory manner; (2) that, although the Act was meant to enforce the Fifteenth

Amendment, the 89th Congress did not intend to legislate to that Amendment's "outer limit"; and (3) that present-day Virginia is not a one-party Commonwealth, unlike post-Reconstruction Texas—is persuasive. Pp. 210–219.

(d) None of the dissents' arguments for rejecting the foregoing construction of § 5—that a political party is not a "State or political subdivision" within § 5's literal meaning because it is not a governmental unit; that the Court should not defer to the Attorney General's regulation when construing § 5's coverage; that a major political party is not a "state actor" under the Court's decisions unless its nominees are virtually certain to win the general election; and that the construction amounts to adoption of a "blanket rule" that all political parties must preclear all of their internal procedures—is convincing. Pp. 220–226.

(e) Appellees' practical objections to the foregoing construction of § 5—(1) that it will create an administrative nightmare for political parties and the Justice Department, and (2) that it threatens to abridge First Amendment associational rights—are rejected. Pp. 227–229.

2. Section 10 of the Act—which does not expressly mention private actions when it authorizes the Attorney General to file suit against racially motivated poll taxes—does not preclude appellants from challenging the Party's registration fee as a prohibited poll tax. Evaluation of congressional action must take into account its contemporary legal context. See, *e. g., Cannon* v. *University of Chicago*, 441 U. S. 677, 698–699. Because the Act was passed against a "backdrop" of decisions in which implied causes of action were regularly found, see *id.*, at 698, and nn. 22–23, private parties may sue to enforce § 10, just as they may enforce § 5, see *Allen, supra,* at 556, 557, n. 23, or § 2, see, *e. g., Chisom* v. *Roemer*, 501 U. S. 380. Appellees' argument to the contrary was rejected in *Allen, supra*, at 556, n. 20, and is also refuted by §§ 3 and 14(e) of the Act, both of which recognize the existence of a private § 10 right of action. Appellees' argument that a delegate registration fee is not a poll tax addresses the merits and should be considered by the District Court in the first instance. Pp. 230–235.

JUSTICE BREYER, joined by JUSTICE O'CONNOR and JUSTICE SOUTER, concluded:

1. In light of the legislative history demonstrating that, in 1965, Congress was well aware of the White Primary Cases, the failure of case-by-case enforcement of the Fifteenth Amendment, and Mississippi's then-recent efforts to use an "all-white" convention process to help nominate a Democratic candidate for President, and that the Act's "party office" provision was adopted to cover the latter type of situation, the Act cannot be interpreted to contain a loophole excluding all political party activity, but must be read to apply to certain convention-based

practices and procedures with respect to voting. That is as far as the Court need go to answer the statutory question presented by this case. Indeed, it is as far as the Court should go, given the difficult First Amendment questions about the extent to which the Federal Government, through preclearance procedures, can regulate the workings of a political party convention, and about the limits imposed by the state-action doctrine. Such questions are properly left for a case that squarely presents them. The fee imposed here, however, is within the scope of § 5, and well outside the area of greatest associational concern. Pp. 235–240.

2. Congress intended to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5. See *Allen* v. *State Bd. of Elections,* 393 U. S. 544, 556–557. JUSTICE BREYER expressed no view as to the merits of the underlying § 10 claim. P. 240.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which GINSBURG, J., joined. BREYER, J., filed an opinion concurring in the judgment, in which O'CONNOR and SOUTER, JJ., joined, *post,* p. 235. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post,* p. 241. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post,* p. 247. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, and in which KENNEDY, J., joined as to Part II, *post,* p. 253.

Pamela S. Karlan argued the cause for appellants. With her on the briefs were *George A. Rutherglen, Eben Moglen,* and *Daniel R. Ortiz.*

Deputy Solicitor General Bender argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days, Assistant Attorney General Patrick, Richard H. Seamon,* and *Steven H. Rosenbaum.*

E. Duncan Getchell, Jr., argued the cause for appellees. With him on the brief were *J. Robert Brame III, Patrick M. McSweeney, Donald W. Lemons,* and *Robert L. Hodges.**

---

*Briefs of *amici curiae* urging reversal were filed for the Lawyers' Committee for Civil Rights under Law et al. by *Donald B. Verrilli, Jr., Michael A. Cooper, Herbert J. Hansell, Norman Redlich, Barbara R. Arnwine, Thomas J. Henderson, Brenda Wright,* and *Laughlin McDonald;*

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which JUSTICE GINSBURG joins.

In 1994, all registered voters in Virginia who were willing to declare their intent to support the Republican Party's nominees for public office at the next election could participate in the nomination of the Party's candidate for the office of United States Senator if they paid either a $35 or $45 registration fee. Appellants contend that the imposition of that fee as a condition precedent to participation in the candidate selection process was a poll tax prohibited by the Voting Rights Act of 1965. The questions we must decide are whether § 5 of the Act required preclearance of the Party's decision to exact the fee and whether appellants were permitted to challenge it as a poll tax prohibited by § 10.

I

On December 16, 1993, the Republican Party of Virginia (Party) issued a call for a state convention to be held on June 3, 1994, to nominate the Republican candidate for United States Senator. The call invited all registered voters in Virginia to participate in local mass meetings, canvasses, or conventions to be conducted by officials of the Party. Any voter could be certified as a delegate to the state convention by a local political committee upon payment of a registration fee of $35 or $45 depending on the date of certification. Over 14,000 voters paid the fee and took part in the convention.

In response to the call, appellants Bartholomew, Enderson, and Morse sought to become delegates to the convention.

---

and for the National Association for the Advancement of Colored People by *Ronald D. Maines*, *Dennis Courtland Hayes*, and *Willie Abrams*.

James S. Gilmore III, Attorney General, *David E. Anderson*, Chief Deputy Attorney General, *John Paul Woodley, Jr.*, and *William H. Hurd*, Deputy Attorneys General, and *Maureen Riley Matsen*, Assistant Attorney General, filed a brief for the Commonwealth of Virginia as *amicus curiae* urging affirmance.

As a registered voter in Virginia willing to declare his or her intent to support the Party's nominee, each was eligible to participate upon payment of the registration fee. Bartholomew and Enderson refused to pay the fee and did not become delegates; Morse paid the fee with funds advanced by supporters of the eventual nominee.

On May 2, 1994, appellants filed a complaint in the United States District Court for the Western District of Virginia alleging that the imposition of the registration fee violated §§5 and 10 of the Voting Rights Act, 79 Stat. 439, 442, as amended, 42 U. S. C. §§1973c[1] and 1973h, as well as the Equal Protection Clause of the Fourteenth Amendment[2] and the Twenty-fourth Amendment[3] to the Constitution. They sought an injunction preventing the Party from imposing the fee and ordering it to return the fee paid by Morse. As §§ 5 and 10 require, a three-judge District Court was convened to consider the statutory claims. See *Morse* v. *Oliver North for U. S. Senate Comm., Inc.*, 853 F. Supp. 212 (WD Va. 1994). That court remanded the two constitutional claims to a single-judge District Court,[4] and, after expedited briefing and argument, granted the Party's motion to dismiss the § 5 and § 10 claims.

---

[1] As originally enacted, §5 provided:

"SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court." 79 Stat. 437.

[2] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14.

After noting "a general rule" that political parties are subject to § 5 to the extent that they are empowered to conduct primary elections, the court gave two reasons for concluding that the rule did not apply to the selection of delegates to a state nominating convention. First, it read a regulation promulgated by the Attorney General as disavowing § 5 coverage of political party activities other than the conduct of primary elections. Second, it relied on our summary affirmance of the District Court's holding in *Williams* v. *Democratic Party of Georgia*, Civ. Action No. 16286 (ND Ga., Apr. 6, 1972), that § 5 does not cover a party's decision to change its method of selecting delegates to a national convention. See 409 U. S. 809 (1972). Its dismissal of the § 10 claim rested on its view that only the Attorney General has authority to enforce that section of the Act. 853 F. Supp., at 215–217.

---

[3] "SECTION 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

"SECTION 2. The Congress shall have power to enforce this article by appropriate legislation." U. S. Const., Amdt. 24.

[4] A separate statutory claim alleging that the loan to appellant Morse violated § 11(c) of the Act, 42 U. S. C. § 1973i(c), was also remanded to the single-judge District Court. Neither that claim nor either of the constitutional claims is before us.

We noted probable jurisdiction, 513 U. S. 1125 (1995), and now reverse.

II

In the Voting Rights Act of 1965, Congress enacted a complex scheme of remedies for racial discrimination in voting that were to be applied in areas where such discrimination had been most flagrant. Section 4 of the Act sets forth the formula for identifying the jurisdictions in which such discrimination had occurred, see *South Carolina* v. *Katzenbach,* 383 U. S. 301, 317–318 (1966), and § 5 prescribes the most stringent of those remedies. It prohibits the enactment or enforcement by any covered jurisdiction of voting qualifications or procedures that differ from those in effect on November 1, 1964, or two later dates, unless they have been precleared by the Attorney General or approved by the United States District Court for the District of Columbia. See *Allen* v. *State Bd. of Elections,* 393 U. S. 544, 548–550 (1969).[5] Virginia is one of the seven States to which the § 4 coverage formula was found applicable on August 7, 1965.[6] The entire Commonwealth has been subject to the preclearance obligation of § 5 ever since.

It is undisputed that the Party's practice of charging a registration fee as a prerequisite to participation in the process of selecting a candidate for United States Senator was not in effect on November 1, 1964. It is also undisputed that if the candidate had been selected in a primary election, the Party could not have enforced a voting qualification or procedure different from those in effect on November 1, 1964, without first preclearing it under §5. Finally, we understand the Party to agree that if the registration fee had been mandated by state law, or by a state election official, preclearance would have been required.

---

[5] In order to obtain preclearance, the covered jurisdiction must demonstrate that its new procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]," 42 U. S. C. § 1973c. The fact that such a showing could have been made, but was not, will not excuse the failure to follow the statutory preclearance procedure. "Failure to obtain either judicial or administrative preclearance 'renders the change unenforceable.'" *Clark* v. *Roemer,* 500 U. S. 646, 652 (1991) (quoting *Hathorn* v. *Lovorn,* 457 U. S. 255, 269 (1982)).

[6] 30 Fed. Reg. 9897 (1965). The others were Alabama, Alaska, Georgia, Louisiana, Mississippi, and South Carolina. *Ibid.* In addition, portions of North Carolina, Arizona, Hawaii, and Idaho were designated then or shortly thereafter. See 30 Fed. Reg. 14505 (1965).

What is in dispute is whether the coverage of §5 encompasses the Party's voting qualifications and procedures when its nominees are chosen at a convention. In answering that question, we first note that the District Court's decision is not supported either by the Attorney General's regulation or by the narrow holding in the *Williams* case. We then explain why coverage is mandated by our consistent construction of the text and history of the Act. Finally, we discuss the §10 private cause of action issue.

III

The Party does not question the validity of the Attorney General's regulation. That regulation unambiguously provides that when a political party makes a change affecting voting, §5 requires preclearance if two conditions are satisfied: The change must relate to "a public electoral function of the party" and the party must be "acting under authority explicitly or implicitly granted by a covered jurisdiction."[7]

---

[7] The regulation, which was adopted in 1981, provides:

"Political parties. Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance require-

The Party does not deny that the delegate fee is a change that relates to a public electoral function of the Party. It argues, instead, that the regulation did not apply when it selected its nominee for United States Senator at a convention because it was not "acting under authority" granted by Virginia. We disagree. The District Court erred in its application of the regulation, because the Party exercised delegated state power when it certified its nominee for automatic placement on Virginia's general election ballot.

Virginia law creates two separate tracks for access to the ballot, depending on the affiliation of the candidate. An independent candidate for a statewide office must comply with several requirements. The candidate must file a declaration of candidacy with the State Board of Elections. He or she must also file a petition signed by a predetermined number of qualified voters. For elections to the United States Senate, that number is equal to one-half of one percent of the registered voters in the Commonwealth, with at least 200 signatures from each of the 11 congressional districts. Va. Code Ann. §24.2–506 (1993). In 1994, the required number of signatures was 14,871.[8]

By contrast, the election code provides that the nominees of the two major political parties[9] shall automatically appear

---

ment. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5. Where appropriate the term 'jurisdiction' (but not 'covered jurisdiction') includes political parties." 28 CFR §51.7 (1995).

[8] Virginia had 2,974,149 registered voters on January 1, 1994. See State Bd. of Elections, Commonwealth of Virginia, Number of Precincts and Registered Voters as of January 1, 1994, p. 4 (rev. Jan. 10, 1994). One-half of one percent of that figure is 14,871.

[9] Virginia law defines the term "political party" to include an organization of Virginia citizens "which, at either of the two preceding statewide general elections, received at least ten percent of the total vote cast for any statewide office filled in that election." Va. Code Ann. §24.2–101

on the general election ballot, without the need to declare their candidacy or to demonstrate their support with a nominating petition. § 24.2–511. Party nominees are listed sequentially on the ballot before independent candidates, all of whom are grouped together in a separate row or column or spaced apart from the former.[10] §§ 24.2–613, 24.2–640. Virginia law authorizes the two parties to determine for themselves how they will select their nominees—by primary, by nominating convention, or by some other method. § 24.2–509(A).[11] The Republican Party has taken advantage

---

(1993). The Democratic Party of Virginia and the Republican Party of Virginia are the only organizations that satisfy that definition.

The definition has not been set in stone, however. Before 1991, the term "political party" included only parties that polled 10 percent of the vote at the *last* preceding statewide election. The Democratic Party, however, did not field a candidate for the 1990 Senate race, and thus would have lost its automatic ballot access for the next election. See 29 Council of State Governments, Book of the States 260 (1992–1993 ed.). Rather than allow that outcome, the Virginia Legislature amended the definition to qualify parties that polled the requisite number of votes at either of the *two* preceding elections and provided that the amendment would apply retroactively. See 1991 Va. Acts, ch. 12, § 1(7).

[10] Virginia law also allows the major political parties to substitute a new nominee should the chosen nominee die, withdraw, or have his or her nomination set aside. In that circumstance, other parties and independent candidates are also permitted to make nominations, but the triggering event occurs only when a party nominee cannot run. The statute thus ensures that the major parties will always have a candidate on the ballot. See Va. Code Ann. §§ 24.2–539, 24.2–540 (1993).

[11] In some circumstances, a primary election is required unless the incumbent officeholder from that party consents to a different method of nomination. Va. Code Ann. § 24.2–509(B) (1993). In its brief, the Party suggested that this one exception to plenary party control over the method of nomination is unconstitutional. See Brief for Appellees 31. While it appeared that the Party might bring suit before the 1996 election to try to have the provision struck down, see Whitley, Republicans Wrestle with Primary Issue, Richmond Times-Dispatch, Oct. 25, 1995, p. B1, it relented after the Attorney General of Virginia determined that the law was probably valid. See Va. Op. Atty. Gen. (Nov. 22, 1995). In any event, because the incumbent United States Senator was a Democrat in 1994, the Party

of these options in past elections. Its nominee has sometimes been selected by the Party's State Central Committee, sometimes by statewide convention, and sometimes by primary election. Whatever method is chosen, state law requires the Commonwealth to place the name of the nominee on the general election ballot.[12]

In this dual regime, the parties "ac[t] under authority" of Virginia when they decide who will appear on the general election ballot. 28 CFR § 51.7 (1995). It is uncontested that Virginia has sole authority to set the qualifications for ballot access. Pursuant to that authority, the Commonwealth has prescribed stringent criteria for access with which nearly all independent candidates and political organizations must comply. But it reserves two places on its ballot—indeed, the top two positions[13]—for the major parties to fill with their nominees, however chosen. Those parties are effectively granted the power to enact their own qualifications for placement of candidates on the ballot, which the Commonwealth ratifies by adopting their nominees. By holding conventions, for example, the Party does not need to

---

was authorized to follow any method it chose, so long as it named its candidate within the time period prescribed by the statute.

[12] The Secretary of the Party is required to certify the name of the nominee to the State Board of Elections. If certification is not timely, however, the board will declare the chosen candidate to be the nominee and treat his or her name as if certified. Va. Code Ann. § 24.2–511 (1993).

[13] Research has shown that placement at the top of a ballot often confers an advantage to candidates so positioned. The classic study of the phenomenon is H. Bain & D. Hecock, Ballot Position and Voter's Choice: The Arrangement of Names on the Ballot and its Effect on the Voter (1957). See also Note, California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents, 45 S. Cal. L. Rev. 365 (1972) (listing other studies); Note, Constitutional Problems with Statutes Regulating Ballot Position, 23 Tulsa L. J. 123 (1987). Some studies have suggested that the effect of favorable placement varies by type of election, visibility of the race, and even the use of voting machines. See *id.*, at 127. While the research is not conclusive, it is reasonable to assume that candidates would prefer positions at the top of the ballot if given a choice.

assemble thousands of signatures on a petition for its nominee. In some years, as few as 550 nominators have selected the Party's candidate for United States Senate.[14] Even in 1994, when the Party convention had its largest attendance to date, fewer nominators were present than would have been necessary to meet the petition requirement.[15] In any event, state law permits the Party to allow as many or as few delegates as it sees fit to choose the Party nominee.

The Party is thus delegated the power to determine part of the field of candidates from which the voters must choose. Correspondingly, when Virginia incorporates the Party's selection, it "endorses, adopts and enforces" the delegate qualifications set by the Party for the right to choose that nominee. *Smith* v. *Allwright,* 321 U. S. 649, 664 (1944). The major parties have no inherent right to decide who may appear on the ballot. That is a privilege conferred by Virginia law, not natural law. If the Party chooses to avail itself of this delegated power over the electoral process, it necessarily becomes subject to the regulation.[16]

---

[14] App. 24 (affidavit of David S. Johnson, Exec. Dir. of Republican Party of Virginia ¶ 12).

[15] According to the Party, 14,614 voters attended the 1994 convention. *Ibid.* A total of 14,871 signatures were required to qualify as an independent candidate. See n. 8, *supra.*

[16] The Party argues that automatic ballot access is merely a "practical accommodation to political reality" because the major parties have shown, through their performance in previous elections, significant levels of voter support. Brief for Appellees 32. According to the Party, the Party nominee need not demonstrate personal support because he or she is credited with the Party's showing. *Id.,* at 33 (citing Weisburd, Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods, 57 S. Cal. L. Rev. 213, 242 (1984)).

Such "crediting" does not answer the question why the Party nominee should receive automatic ballot access. The fact that the Party has polled well in previous elections does not logically entail any conclusion about the success of its present candidate—especially when that nominee is chosen at a convention attended by limited numbers of Party members, rather than a primary. Furthermore, ballot access for all other candidates is

In concluding that the regulation applies to the Party, we are guided by the reasoning of *Smith* v. *Allwright*, decided more than half a century ago. There, Texas gave automatic ballot access to the nominee of any party that polled a certain number of votes at the preceding general election, and required independent candidates to file nominating petitions. *Id.*, at 653, n. 6, 663. We explained that "recognition of the place of the primary in the electoral scheme," rather than the degree of state control over it, made clear that "state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State." *Id.*, at 660. The only difference here is that Virginia has not required its political parties to conduct primary elections to nominate their candidates. But the right to choose the method of nomination makes the delegation of authority in this case more expansive, not less, for the Party is granted even greater power over the selection of its nominees. See generally L. Tribe, American Constitutional Law § 13–24, p. 1121, and n. 3 (2d ed. 1988); Rotunda, Constitutional and Statutory Restrictions on Political Parties in the Wake of *Cousins* v. *Wigoda*, 53 Texas L. Rev. 935, 953–954 (1975);

---

predicated on a showing of individual electability. The Commonwealth certainly may choose to recognize the Party's selection of a nominee, but such recognition is not mandated by any right of the Party to demand placement on the ballot. Contrary to appellees, cases such as *Williams* v. *Rhodes*, 393 U. S. 23 (1968), *Jenness* v. *Fortson*, 403 U. S. 431 (1971), and *American Party of Tex.* v. *White*, 415 U. S. 767 (1974), establish only that political parties with at least a modicum of public support must be provided a reasonable method of ballot access. They do not establish that they are entitled to choose the method itself.

According to JUSTICE THOMAS, the Party merely "takes advantage of favorable state law" when it certifies its nominee for automatic placement on the ballot. *Post*, at 274. On that theory, the requirements of 28 CFR § 51.7 (1995) would not be met even if Virginia let only the two major parties place their candidates on the ballot, and no one else. For the same reasons we give below, see *infra*, at 220–221, it is implausible to think the regulation was meant to apply only in one-party States.

Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1159–1163 (1975). By the logic of *Smith*, therefore, the Party acted under authority of the Commonwealth.[17]

It is true that the example set forth in the Attorney General's regulation describes changes in the conduct of primary elections. That example, however, does not purport to define the outer limits of the coverage of § 5. Moreover, both in its brief *amicus curiae* supporting appellants in this case and in its prior implementation of the regulation, the Department of Justice has interpreted it as applying to changes affecting voting at a party convention.[18] We are satisfied that the Department's interpretation of its own regulation is correct. See *Stinson* v. *United States*, 508 U. S. 36, 45 (1993); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945). Accordingly, we conclude that the regulation required preclearance of the Party's delegate filing fee.

---

[17] JUSTICE THOMAS argues that our decision in *Smith* v. *Allwright*, 321 U. S. 649 (1944), depended on the State's regulation of the Party's activities. *Post*, at 268. While it is true that political parties in *Smith* were subject to extensive regulation, nothing in our decision turned on that factor. Only nine years before *Smith*, the Court had surveyed the same statutory regime in *Grovey* v. *Townsend*, 295 U. S. 45, 50 (1935), and concluded that primary elections were private voluntary activity. What changed was not the extent of state regulation, but the Court's understanding, based on its intervening decision in *United States* v. *Classic*, 313 U. S. 299 (1941), that primaries were "a part of the machinery for choosing officials." 321 U. S., at 664. On that basis, the Court overruled *Grovey*, even though the objectionable practice there of excluding blacks from membership in the party was undertaken by a private, unregulated entity.

The irrelevance of state regulation was confirmed in two cases decided after *Smith*. Subsequent to *Smith*, South Carolina repealed all of its laws regulating political primaries. The Democratic primary was thereafter conducted under rules prescribed by the Democratic Party alone, which included rules restricting the primary to white persons. The Fourth Circuit struck down those practices, reasoning that "[s]tate law relating to the general election gives effect to what is done in the primary and makes it just as much a part of the election machinery of the state by which the people choose their officers *as if it were regulated by law*, as formerly." *Rice* v. *Elmore*, 165 F. 2d 387, 390–391 (1947) (emphasis added); accord, *Baskin* v. *Brown*, 174 F. 2d 391 (1949). The principal opinion in *Terry* v. *Adams*, 345 U. S. 461 (1953), declared that these cases were "in accord with the commands of the Fifteenth Amendment and the laws passed pursuant to it." *Id.*, at 466 (opinion of Black, J.).

[18] See Brief for United States as *Amicus Curiae* 11–13. Since 1981, when the regulation was promulgated, there have been nearly 2,000 preclearance submissions involving more than 16,000 proposed changes by

The decision in *Williams* v. *Democratic Party of Georgia*, upon which the District Court relied in dismissing this complaint, is not to the contrary. The fact that Virginia statutes grant the nominee of the Party a position on the general election ballot graphically distinguishes the two cases. *Wil-*

---

political parties in covered jurisdictions. See letter from Drew S. Days III, Solicitor General, to William K. Suter, Clerk of the Supreme Court, dated Oct. 4, 1995 (lodged with Clerk of this Court). Of particular note, on April 12, 1982, the Attorney General precleared changes in the delegate selection plan adopted by the Democratic Party of Virginia for its senatorial nominating convention. See Brief for United States as *Amicus Curiae* 12, n. 7; letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Div., to Russel Rosen, Executive Director, Democratic Party of Va., dated Apr. 12, 1982 (lodged with Clerk of this Court).

Political parties submitted changes in their rules for preclearance, and the Department of Justice interposed objections to those changes, long before 1981. For example: the Sumter County, Alabama, Democratic Executive Committee submitted changes in 1974, and the Democratic Party of New York City submitted changes in 1975. See Extension of the Voting Rights Act: Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong., 1st Sess., pt. 3, pp. 2246, 2265 (1981) (app. to letter from James P. Turner, Acting Ass't Attorney General, to Rep. Edwards dated Apr. 9, 1981). Parties from New York, North Carolina, and Alabama submitted changes in 1972. See D. Hunter, Federal Review of Voting Changes 69, n. 30 (1974), reprinted in Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 1st Sess., 1541 (1975). In *MacGuire* v. *Amos*, 343 F. Supp. 119, 121 (MD Ala. 1972), a three-judge court held that rules promulgated by the Alabama Democratic and Republican Parties governing election of national delegates required preclearance, despite the fact that the rules were not passed by "the State's legislature or by a political subdivision of the State." As a result of this decision, the Democratic Party of Alabama sought judicial preclearance under § 5. See *Vance* v. *United States*, Civ. Action No. 1529–72 (DDC Nov. 30, 1972), cited in Hunter, Federal Review of Voting Changes, at 69, n. 30.

liams did not concern the selection of nominees for state elective office, but rather a political party's compliance with a rule promulgated by the Democratic National Party governing the selection of delegates to its national convention. According to the District Court's interpretation of Georgia law, the State exercised no control over, and played no part in, the state Party's selection of delegates to the Democratic National Convention.[19] Because the Commonwealth delegated no authority to the Party to choose the delegates, the Party did not act under the authority, implicit or explicit, of the Commonwealth.

If anything, the logic of *Williams* supports application of the preclearance requirement. The District Court stated that it was "convinced that voting rights connected with the delegate election process are the type of rights Congress intended to safeguard" by passage of the Act. Civ. Action No. 16286, at 4. It declined to require the party to preclear changes in its nominating methods only because there were no administrative procedures for submission of such changes at the time of the decision. *Id.*, at 5. Since then, however, the Attorney General has clarified that "an appropriate official of the political party" may submit party rules affecting voting for preclearance, 28 CFR § 51.23(b) (1993), thereby eliminating this one practical obstacle. Other lower courts have subsequently required preclearance of internal party rules, even when those rules do not relate to the conduct of primary elections.[20] Indeed, if the rationale of *Williams* were still valid, § 5 would not cover party primaries either, for the party (by hypothesis) would likewise have no means of preclearing changes. But it is firmly established—and the Party does not dispute—that changes affecting primaries carried out by political parties must be precleared.[21]

---

[19] "The State has no connection with the delegate selection process or State Party's rules and regulations other than allowing the rules and regulations to be filed under Ga. Code Ann. § 34–902. The purpose of such filing is merely to provide a place for public inspection of the State Party's rules and regulations." *Williams* v. *Democratic Party of Georgia*, Civ. Action No. 16286 (ND Ga., Apr. 6, 1972), pp. 4–5. In their motion to affirm in that case, the appellees noted that the Secretary of State of Georgia was obligated to approve a political party's rules applicable to the selection of candidates for public office by convention but had no authority to review the rules and regulations promulgated by the National Democratic Party governing the selection of delegates to its national convention. Under the Attorney General's regulation that is now in effect, preclearance of the National Democratic Party's rule change would not have been required if the District Court's interpretation of Georgia law was correct. Our summary affirmance no doubt accepted that court's view of the relevant state law. Cf. *Bishop* v. *Wood*, 426 U. S. 341, 345–346 (1976).

The District Court was therefore incorrect to base its decision on either the Attorney General's regulation or on our summary affirmance in *Williams*. The Party's activities fall directly within the scope of the regulation. We next conclude, based on the language and structure of the Act, and the historical background which informed the Congress that enacted it, that § 5 of its own force covers changes in electoral practices such as the Party's imposition of a filing fee for delegates to its convention.

IV

Section 5 of the Act requires preclearance of changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." Section

---

[20] See, *e. g., Fortune* v. *Kings County Democratic Comm.*, 598 F. Supp. 761, 764 (EDNY 1984) (requiring preclearance of change in voting membership of county party executive committee, because those members performed a "public electoral function" in filling vacancies in nominations for state office).

[21] We also note that a summary affirmance by this Court is a "rather slender reed" on which to rest future decisions. *Anderson* v. *Celebrezze*, 460 U. S. 780, 784–785, n. 5 (1983). "A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment." *Ibid.* Either of the two grounds discussed above—the State's noninvolvement or the absence of suitable administrative procedures for submission—would have sufficed for our affirmance.

14 defines the terms "vote" or "voting" to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." 42 U. S. C. § 1973*l*(c)(1).

Although a narrow reading of the text of the Voting Rights Act might have confined the coverage of § 5 to changes in election practices that limit individual voters' access to the ballot in jurisdictions having authority to register voters, see *United States* v. *Sheffield Bd. of Comm'rs,* 435 U. S. 110, 140–150 (1978) (STEVENS, J., dissenting); *Holder* v. *Hall,* 512 U. S. 874, 892, 914 (1994) (THOMAS, J., concurring in judgment), the Court has squarely rejected that construction. Shortly after the statute was passed, the Court thoroughly reviewed its legislative history and found that Congress intended § 5 to have "the broadest possible scope" reaching "any state enactment which altered the election law of a covered State in even a minor way." *Allen* v. *State Bd. of Elections,* 393 U. S., at 566–567. Similarly, in *Sheffield,* the Court concluded that "the language of the Act does not require such a crippling interpretation, but rather is susceptible of a reading that will fully implement the congressional objectives." 435 U. S., at 117. We expressly held that "§ 5, like the constitutional provisions it is designed to implement, applies to all entities having power over any aspect of the electoral process within designated jurisdictions, not only to counties or to whatever units of state government perform the function of registering voters." *Id.,* at 118. More recently we noted that § 5 is "expansive within its sphere of operation" and "comprehends all changes to rules governing voting." *Presley* v. *Etowah County Comm'n,* 502 U. S. 491, 501 (1992).

We have consistently construed the Act to require preclearance of any change in procedures or practices that may bear on the "effectiveness" of a vote cast in "any primary, special, or general election." 42 U. S. C. § 1973*l*(c)(1). Rules concerning candidacy requirements and qualifications, we have held, fall into this category because of their potential to "undermine the effectiveness of voters who wish to elect [particular] candidates." *Allen*, 393 U. S., at 570; see also *Dougherty County Bd. of Ed.* v. *White*, 439 U. S. 32, 40 (1978). Changes in the composition of the electorate that votes for a particular office—that is, situations that raise the specter of vote dilution—also belong to this class because they could "nullify [voters'] ability to elect the candidate of their choice just as would prohibiting some of them from voting." 393 U. S., at 569. This nexus between the changed practice and its impact on voting in the general election has been a recurring theme in our cases interpreting the Act. See *Chisom* v. *Roemer*, 501 U. S. 380, 397 (1991) ("Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election"). In its reenactments and extensions of the Act, moreover, Congress has endorsed these broad constructions of § 5. See, *e. g.*, S. Rep. No. 97–417, pp. 6–7, and n. 8 (1982).

A filing fee for party delegates operates in precisely the same fashion as these covered practices. By limiting the opportunity for voters to participate in the Party's convention, the fee undercuts their influence on the field of candidates whose names will appear on the ballot, and thus weakens the "effectiveness" of their votes cast in the general election itself. As an elementary fact about our Nation's political system, the significance of the nominating convention to the outcome in the general election was recognized as long ago as Justice Pitney's concurrence in *Newberry* v. *United States*, 256 U. S. 232 (1921). Joined by Justices Brandeis and Clarke, he wrote: "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the major political parties] have been made." *Id.*, at 286 (opinion concurring in part). See also *United States* v. *Classic,* 313 U. S. 299, 319 (1941) (endorsing the *Newberry* concurrence). Just like a primary, a convention narrows the field of candidates from a potentially unwieldy number to the serious few who have a realistic chance to win the election. We have held, in fact, that the State's compelling interest in winnowing down the candidates justifies substantial restrictions on access to the ballot. *American Party of Tex.* v. *White,* 415 U. S. 767, 782, and n. 14 (1974). Virginia, no doubt, would justify its own ballot access rules—including those for the major parties—on just this basis.[22]

We have previously recognized that § 5 extends to changes affecting nomination processes other than the primary. In *Whitley* v. *Williams,* one of the companion cases decided with *Allen,* this Court affirmed § 5 coverage of a scheme that placed new burdens on voters who wished to nominate independent candidates by petition. The Court was unconcerned that the changes did not directly relate to the conduct of a primary, because they had an effect on the general election. See *Allen,* 393 U. S., at 570. One of those changes was a requirement that each nominator sign the petition personally and state his or her polling precinct and county. See *id.,* at 551. Like the filing fee in this case, that condition made it more difficult for voters to participate in the nomination process, and therefore properly fell within § 5's scope. A fee of $45 to cast a vote for the Party nominee is, if anything, a more onerous burden than a mere obligation to include certain public information about oneself next to one's name on a nominating petition. In dissent, Justice Harlan agreed that "the nominating petition is the functional equivalent of the political primary." *Id.*, at 592 (opinion concurring in part and dissenting in part).

---

[22] Virginia created its first signature requirement for self-nominated candidates in 1936. See Va. Code Ann., Tit. 6, § 154 (1936) (requiring petition signed by 250 qualified voters of the Commonwealth). Although the Commonwealth maintains limited legislative history records, contemporary news accounts reported that the provision was designed to "discourage cranks and persons who for personal glorification take advantage of the very liberal terms of the election code." New Qualification, The Richmond News Leader, Mar. 6, 1936, p. 8. Then as now, political parties were exempt from the signature requirement.

Delegate qualifications are in fact more closely tied to the voting process than practices that may cause vote dilution, whose coverage under § 5 we have repeatedly upheld. Virginia, like most States, has effectively divided its election into two stages, the first consisting of the selection of party candidates and the second being the general election itself. See *United States* v. *Classic*, 313 U. S., at 316. Exclusion from the earlier stage, as two appellants in this case experienced, does not merely curtail their voting power, but abridges their right to vote itself. To the excluded voter who cannot cast a vote for his or her candidate, it is all the same whether the party conducts its nomination by a primary or by a convention open to all party members except those kept out by the filing fee. Each is an "integral part of the election machinery." *Id.*, at 318.

The reference to "party office" in § 14, which defines the terms "vote" and "voting" as they appear throughout the Act, reinforces this construction of § 5. Section 14 specifically recognizes that the selection of persons for "party office" is one type of action that may determine the effectiveness of a vote in the general election. Delegates to a party convention are party officers. See H. R. Rep. No. 439, 89th Cong., 1st Sess., 32 (1965) ("Thus, for example, an election of delegates to a State party convention would be covered by the act"). The phrase "votes cast with respect to candidates for public or party office" in § 14 is broad enough to encompass a variety of methods of voting beyond a formal election.[23] Cf. *Classic*, 313 U. S., at 318. The Party itself recognizes this point, for both in its brief to this Court and in its Plan of Organization, it repeatedly characterizes its own method of selecting these delegates as an "election."[24]

The legislative history of § 14 supports this interpretation. Representative Bingham proposed addition of the term "party office" to the language of the section for the express purpose of extending coverage of the Act to the nominating activities of political parties. See Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 456–457 (1965) (proposing coverage of "political party meetings, councils, conventions, and referendums which lead to endorsement or selection of candidates who will run in primary or general elections"). Congressional concern that the Act reach the selection of party delegates was not merely speculative. On the floor of the House, Representative Bingham expressed the importance of preventing a reprise of the fiasco of the previous year, 1964, "when the regular Democratic delegation from Mississippi to the Democratic National Convention was chosen through a series of Party caucuses and conventions from which Negroes were excluded." 111 Cong. Rec. 16273 (1965); see also Hearings on H. R. 6400, 89th Cong., 1st Sess., at 456 ("The events of 1964 demonstrate the need" to expand § 14). As he later explained, the solution that was reached to this problem was "to add to the definition of the word 'vote' in section 14(c)(1)." 111 Cong. Rec. 16273. The Party's delegates to its 1994 convention were chosen through precisely the same methods Representative Bingham described: mass meetings, conventions, and canvasses. Exempting the Party from the scope of § 14 would thus defeat the purpose for which the House and eventually Congress as a whole adopted Representative Bingham's amendment.

---

[23] Quoting this very language, we have observed that candidates are nominated, not elected. *Chisom* v. *Roemer*, 501 U. S. 380, 400 (1991). It is not anomalous, therefore, to hold that § 5 applies regardless of the means of nomination.

[24] See Brief for Appellees 2; App. 32 (Republican Party Plan, Art. II, ¶ 22) (defining "Party Canvass" as "a method of electing . . . delegates to Conventions"); *id.*, at 52 (Plan, Art. VIII, § A, ¶ 3) (referring to "any election by a Mass Meeting, Party Canvass, or Convention"); *id.*, at 56 (Plan, Art. VIII, § H, ¶ 4); *id.*, at 23 (affidavit of David S. Johnson, Exec. Dir. of Republican Party of Virginia, ¶¶ 5, 8). The call for the state convention itself, to which appellants responded, stated: "The delegates and alternates shall be elected in county and city Mass Meetings, Conventions or Party Canvasses that shall be held between March 1, 1994 and April 1, 1994." *Id.*, at 62.

The text of § 2 also makes apparent the Act's intended coverage of nonprimary nomination methods. Section 2, which bans any "voting qualification or prerequisite" that discriminates on account of race or color, considers a violation to have occurred if "*the political processes leading to nomination or election* in the State or political subdivision are not equally open to participation by members of [groups protected by the Act] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b) (1988 ed.) (emphasis added). Under the broad sweep of this language, exclusion from a nominating convention would qualify as a violation. Section 2 "adopts the functional view of 'political process'" and applies to "any phase of the electoral process." S. Rep. No. 97–417, at 30, and n. 120.

If such practices and procedures fall within the scope of § 2, they must also be subject to § 5. In recent cases, some Members of this Court have questioned whether § 2 is as broad as § 5, see *Chisom* v. *Roemer*, 501 U. S., at 416–417 (SCALIA, J., dissenting); *Holder* v. *Hall*, 512 U. S., at 882–885 (opinion of KENNEDY, J.); *id.*, at 930 (THOMAS, J., concurring in judgment), but there has never been any doubt about the converse—that changes in practices within covered jurisdictions that would be potentially objectionable under § 2 are also covered under § 5. The purpose of preclearance is to prevent all attempts to implement discriminatory voting practices that change the status quo. If § 5 were narrower than § 2, then a covered jurisdiction would not need to preclear changes in voting practices known to be illegal. "It is unlikely that Congress intended such an anomalous result." *Chisom,* 501 U. S., at 402.[25]

A fair reading of the text of § 5 unquestionably supports the conclusion that by imposing its filing fee the Party sought to administer a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968." 42 U. S. C. § 1973c (1988 ed.).

V

Consideration of the history that led to passage of the Act confirms our construction of § 5. The preamble to the statute expressly identifies the "fifteenth amendment" as the constitutional provision the Act was designed to implement.[26] Our cases dealing with the applicability of that Amendment to the selection of party candidates in States that engaged in the sort of voting discrimination that § 5 was designed to remedy are therefore directly relevant. See *McCain* v. *Lybrand*, 465 U. S. 236, 246 (1984) (interpreting Act "in light of its prophylactic purpose and the historical experience which it reflects"); *Dougherty County Bd. of Ed.* v. *White*, 439 U. S., at 37 (seeking "guidance from the history and purpose of the Act"). In a series of decisions known as the White Primary Cases, this Court applied the Fifteenth and Fourteenth Amendments to strike down a succession of measures by authorities in Texas to exclude minority voters from their nomination processes. These cases demonstrate that electoral practices implemented by political parties have the potential to "den[y] or abridg[e] the right to vote on account of race or color," which § 5 prohibits. 42 U. S. C. § 1973c (1988 ed.).

---

[25] In fact, it did not. The 1981 House Report states that "whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i. e., litigation or preclearance." H. R. Rep. No. 97–227, p. 28. That statement indicates that the substantive standards for § 2 and § 5 violations are the same, so long as the challenged practice represents a change from 1965 conditions, as the filing fee did here. Even more explicitly, the 1982 Senate Report states that "a section 5 objection also follow[s] if a new voting procedure itself so discriminates as to violate section 2." S. Rep. No. 97–417, p. 12, n. 31. The Report refers to voting procedures that dilute minority voting strength. See *id.,* at 10. We have recognized that measures undertaken by both " '[s]tate legislatures *and political party committees*' " have had just such dilutive effects, through devices that included " 'switching to at-large elections where Negro voting strength is concentrated in particular election districts, facilitating the consolidation of predominantly Negro and predominantly white counties, and redrawing the lines of districts to divide concentrations of Negro voting strength.' " *Perkins* v. *Matthews,* 400 U. S. 379, 389 (1971) (quoting Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., 17 (1969) (remarks of Mr. Glickstein)) (emphasis added). See also n. 27, *infra.* Contrary to JUSTICE THOMAS, therefore, Congress has already "harmonize[d]" §§ 2 and 5, see *post,* at 282; it is he who seeks to sunder them.

Nixon v. *Herndon*, 273 U. S. 536 (1927), involved the validity of a Texas statute enacted in 1923 that flatly provided " 'in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas,' " *id.*, at 540. It took only a paragraph for Justice Holmes to conclude that it was "unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth." *Id.*, at 540–541. Promptly after the announcement of that decision, the Texas Legislature responded to what it regarded as an emergency by replacing the invalid provision with a substitute that authorized the executive committee of every political party to determine "in its own way" who shall be "qualified to vote or otherwise participate in such political party." *Nixon* v. *Condon*, 286 U. S. 73, 82

---

[26] "To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes." 79 Stat. 437.

(1932). The State Executive Committee of the Democratic Party adopted a rule that only "white democrats" could participate in the party's primary elections. Pursuant to that rule, Mr. Nixon was again refused a primary ballot and again persuaded this Court that the authors of the discriminatory rule should be "classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action." *Id.*, at 89.

The decision in *Nixon* v. *Condon* relied on the fact that a state statute authorized the Party's Executive Committee to determine the qualifications of voters. Thereafter the Party implemented the same discriminatory policy without statutory authorization by adopting a resolution at a state convention restricting party membership to "white persons." When it first confronted the issue, the Court held that implementation of that rule was not state action. *Grovey* v. *Townsend*, 295 U. S. 45 (1935). A few years later, however, *Grovey* was overruled and the Court decided that the resolution adopted by the party's state convention constituted state action violative of the Fifteenth Amendment even though it was not expressly authorized by statute. *Smith* v. *Allwright*, 321 U. S. 649 (1944). We wrote:

> "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane* v. *Wilson*, 307 U. S. 268, 275 [(1939)]." *Id.*, at 664.

The same policy of excluding all nonwhite voters from the electoral process was thereafter implemented in certain

Texas counties by a private organization known as the Jaybird Democratic Association. It conducted a so-called "Jaybird primary" at which white voters selected candidates who thereafter ran in and nearly always won the Democratic Party's primary and the general election. Although the Jaybirds had no official status, received no state funds, and conducted a purely private election, the Court readily concluded that this voluntary association's exclusion of black voters from its primaries on racial grounds was prohibited by the Fifteenth Amendment. *Terry* v. *Adams*, 345 U. S. 461 (1953). Citing our earlier cases, Justice Clark tersely noted that an "old pattern in new guise is revealed by the record." *Id.*, at 480 (concurring opinion).

Congress passed the Voting Rights Act of 1964 because it concluded that case-by-case enforcement of the Fifteenth Amendment, as exemplified by the history of the white primary in Texas, had proved ineffective to stop discriminatory voting practices in certain areas of the country on account of the intransigence of officials who "resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina* v. *Katzenbach*, 383 U. S., at 335 (citing H. R. Rep. No. 439, at 10–11; S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 8, 12 (1965)). The preclearance system of § 5 was designed to end this evasion once and for all. By prohibiting officials in covered jurisdictions from implementing any change in voting practices without prior approval from the District Court for the District of Columbia or the Attorney General, it sought to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina* v. *Katzenbach*, 383 U. S., at 328.[27]

---

[27] Congress was plainly aware of the power of political parties to carry out discriminatory electoral practices as a supplement to or a substitute for voting discrimination by government officials. Of course, the White Primary Cases supplied the primary historical examples of such prac-

The distinction between a primary and a nominating convention is just another variation in electoral practices that § 5 was intended to cover. The imposition of a $45 fee on

---

tices. See H. R. Rep. No. 439, 89th Cong., 1st Sess., 8 (1965). In addition, during the 1970 extension of the Act, Congress heard testimony from the Director of the United States Civil Rights Commission wherein he reiterated the influence political parties continued to exercise over the electoral process in jurisdictions designated under the Act. He testified that "[s]tate legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the act which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters." Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., 17 (1969) (remarks of Mr. Glickstein), quoted in *Perkins* v. *Matthews*, 400 U. S., at 389. As examples, he introduced evidence that in 1968 the Mississippi Democratic Party persisted in its "pattern of exclusion of and discrimination against Negroes at precinct meetings, county conventions and the State convention," Hearings on Voting Rights Act Extension, 91st Cong., 1st Sess., at 18–19; that other officials "withheld information from black party members about party precinct meetings and conventions or have prevented them from participating fully," *id.*, at 18, 43; that the Alabama Democratic Party raised candidate filing fees for some of its primaries tenfold after blacks began voting in large numbers, *id.*, at 18, 27; and that various party executive committees refused to count votes by blacks who were not on the registration books, even if they were listed by the Federal Examiner, *id.*, at 46, engaged in discriminatory purges of black voters, *id.*, at 48, and misled black candidates about the requirements for running in primary elections or did not notify them of their failure to qualify until after deadlines had passed, *id.*, at 46–47.

In his testimony, Director Glickstein summarized the more extensive findings about discriminatory electoral practices carried out by the established political parties that were set forth in a report prepared by the United States Commission on Civil Rights pursuant to congressional directive. See *id.*, at 17–18. It concluded that, three years after passage of the Act,

> "in some areas there has been little or no progress in the entry and participation by Negroes in political party affairs—the key to meaningful participation in the electoral process. Some of the practices found are reminiscent of those which existed at an earlier time during Reconstruction when fear of 'Negro government' gave rise to intimidation and a number of election contrivances which finally led to disenfranchisement of the Negro citi-

the privilege of participating in the selection of the Party's nominee for the United States Senate is equally a practice or procedure relating to voting whether the selection is made by primary election or by a "convention" in which every voter willing to pay the fee is eligible to cast a vote. A primary election would not cease to be a practice relating to voting if the Party imposed such a high fee that only 14,000 voters cast ballots; nor should a "convention" performing the same electoral function as a primary avoid coverage because fewer voters participate in the process than normally vote in a primary. As was true in *Sheffield,* "the District Court's interpretation of the Act . . . makes § 5 coverage depend upon a factor completely irrelevant to the Act's purposes, and thereby permits precisely the kind of circumvention of congressional policy that § 5 was designed to prevent." 435 U. S., at 117. It would undermine the Act to permit " '[s]uch a variation in the result from so slight a change in form.' " *Terry* v. *Adams,* 345 U. S., at 465, n. 1 (quoting *Smith* v. *Allwright,* 321 U. S., at 661).

Section 5 coverage of nominating conventions follows directly from our decision in *Terry.* Although called a "primary," the Jaybird election was the equivalent of the Party's nominating convention, for it did not involve the State's electoral apparatus in even the slightest way—neither to supply election officials, nor ballots, nor polling places. See 345 U. S., at 471 (opinion of Frankfurter, J.). In fact, the Jaybirds went far beyond the Party in immunizing their nomination process from the State's control. The Jaybird nominee did not receive any form of automatic ballot access. He filed individually as a candidate in the Democratic primary, paid the filing fee, and complied with all requirements to which other candidates were subject. *Id.,* at 486–487 (Minton, J., dissenting). No mention of the nominee's Jaybird affiliation was ever made, either on the primary or on the general elec-

---

zen." U. S. Commission on Civil Rights, Political Participation 178 (May 1968).

tion ballot. Those elections, moreover, were open to any candidate who was able to meet the filing requirements, and to black as well as white voters. If the Jaybirds' nominating process violated the Fifteenth Amendment because black voters were not permitted to participate, despite the entirely voluntary nature of the Jaybird association, then § 5—which requires preclearance of all practices with the potential to discriminate—must cover the Party's exclusion of voters from its convention.[28]

Appellees nevertheless assert that *Terry*, like the other White Primary Cases, has no bearing on the proper interpretation of the Voting Rights Act. They offer three reasons for that contention: first, that their convention did not operate in a racially discriminatory manner, Brief for Appellees 37; second, that the 89th Congress did not intend to legislate to the "outer limit" of the Fifteenth Amendment, *ibid.;* and third, that present-day Virginia is not a one-party Commonwealth, unlike Texas after Reconstruction, *id.*, at 36. None of these reasons is persuasive.

First, while it is true that the case before us today does not involve any charge of racial discrimination in voting, the decision whether discrimination has occurred or was intended to occur, as we have explained on many occasions, is for the Attorney General or the District Court for the District of Columbia to make in the first instance. *NAACP* v. *Hampton County Election Comm'n,* 470 U. S. 166, 181 (1985); *McCain* v. *Lybrand,* 465 U. S., at 250; *Dougherty County Bd. of Ed.* v. *White,* 439 U. S., at 42; *Georgia* v. *United States,* 411 U. S. 526, 534 (1973); *Perkins* v. *Matthews,*

---

[28] The analogy is even closer, for the Jaybirds originally performed their nominations in mass meetings. See 345 U. S., at 470 (opinion of Frankfurter, J.); *id.*, at 480 (Clark, J., concurring). Nothing in any of the opinions suggests—and it would be perverse to suppose—that the Jaybirds' nominating activities only became unconstitutional when they switched to balloting methods.

400 U. S. 379, 383–385 (1971); *Allen* v. *State Bd. of Elections,* 393 U. S., at 570. The critical question for us, as for the District Court below, is whether "the challenged alteration has the *potential* for discrimination." *Hampton County Election Comm'n,* 470 U. S., at 181 (emphasis in original). It is not contested that the Party's filing fee had that potential.[29]

The second argument misconceives the purpose of the preclearance system and the nature of the Act as a whole. Again, the very preamble of the Act states that its purpose is to enforce the Fifteenth Amendment. 79 Stat. 437. Section 5 "is a means of assuring in advance the absence of all electoral illegality, not only that which violates the Voting Rights Act but *that which violates the Constitution as well.*" *Chisom,* 501 U. S., at 416 (SCALIA, J., dissenting) (emphasis added). It is beyond question, therefore, that the Act encompassed the discriminatory practices struck down in *Terry* and *Smith,* which this Court had found violative of the same constitutional guarantees. Not only were they the leading cases securing the right to vote against racial discrimination at the time of enactment, but Congress passed the Act to facilitate the enforcement effort they embodied. It strains credulity to suppose that despite Congress' professed impatience with the "case-by-case" method of enforcing voting rights, it did not mean to cover the cases that capped the struggle to end the white primary.[30]

---

[29] JUSTICE THOMAS' claim that there has been no purposeful evasion of the Constitution, see *post,* at 269–270, is therefore irrelevant.

[30] Appellees' theory is particularly unpersuasive in light of the fact that other parts of the Voting Rights Act reach *beyond* the scope of § 1 of the Fifteenth Amendment. For example, the Act created a *per se* ban on literacy tests despite this Court's decision that facially fair tests are not themselves unconstitutional. *Lassiter* v. *Northampton County Bd. of Elections,* 360 U. S. 45 (1959). We upheld this exercise of Congress' power under § 2 of the Amendment without overruling *Lassiter. South Carolina* v. *Katzenbach,* 383 U. S. 301, 334 (1966); see also *City of Rome*

The final argument fares no better. We have expressly rejected the contention that the right to vote depends on the success rate of the candidates one endorses. Voting at the nomination stage is protected regardless of whether it "invariably, sometimes or never determines the ultimate choice of the representative." *United States* v. *Classic*, 313 U. S., at 318. The operative test, we have stated repeatedly, is whether a political party exercises power over the electoral process. See *United States* v. *Sheffield Bd. of Comm'rs*, 435 U. S., at 122 ("§5 has to apply to all entities exercising control over the electoral processes within the covered States or subdivisions"); *Dougherty County Bd. of Ed.* v. *White*, 439 U. S., at 44–45 (§5 coverage depends only on the "impact of a change on the elective process"); *Terry*, 345 U. S., at 481 ("[A]ny 'part of the machinery for choosing officials' becomes subject to the Constitution's restraints") (quoting *Smith* v. *Allwright*, 321 U. S., at 664). That situation may arise in two-party States just as in one-party States. Indeed, the *Terry* concurrence summarized *Smith* as holding that "the Democratic Party of itself, *and perforce any other political party*, is prohibited by [the Fifteenth] Amendment from conducting a racially discriminatory primary election." *Terry*, 345 U. S., at 481 (Clark, J., concurring) (emphasis added). See also *Moore* v. *Ogilvie*, 394 U. S. 814, 818 (1969) (holding that the use of nomination petitions by *independent candidates* is a procedure that "must pass muster against the charges of discrimination or of abridgment of the right to vote"); *Classic*, 313 U. S., at 318.[31] The contrary position

---

v. *United States*, 446 U. S. 156, 173–178 (1980). Congress again legislated beyond the reach of the Fifteenth Amendment when it amended §2 of the Act to reject the "intent test" propounded in *Mobile* v. *Bolden*, 446 U. S. 55 (1980). See S. Rep. No. 97–417, at 39–43.

[31] JUSTICE THOMAS contends that *United States* v. *Classic* is inapplicable because Party nominating conventions are not "'by law made an integral part of the election machinery.'" *Post*, at 270, n. 12. *Moore* v. *Ogilvie*, 394 U. S. 814 (1969), shows that this view is incorrect. The Court in *Moore* held that the use of nominating petitions by independent candidates

would make little sense. On appellees' theory, one political party could not exclude blacks from the selection of its nominee, however it chose that individual, but two parties each independently could.

In any event, the controlling factor for our construction of § 5 is Congress' intent. It is apparent from the legislative history that Congress did not mean to limit § 5 to political parties whose nominating procedures "foreordained" the results of the general election, see *post*, at 269 (THOMAS, J., dissenting). The impetus behind the addition of the term "party office" to § 14 was the exclusion of blacks from the Mississippi delegation to the National Democratic Convention in 1964. See *supra*, at 208–209. The activities of those delegates did not settle the result of the Presidential race; Republican candidates won the general election in 1952 and 1956, and from 1968 until 1992, excluding 1976. Nevertheless, Congress insisted that the selection of those delegates must be open to all voters, black and white.

The imposition by an established political party—that is to say, a party authorized by state law to determine the method of selecting its candidates for elective office and also authorized to have those candidates' names automatically appear atop the general election ballot—of a new prerequisite to voting for the party's nominees is subject to § 5's preclearance requirement.

---

was an "'integral part of the election process,'" even though a nominating petition obviously is not a primary, and that procedure plainly was not "merged by law," *post*, at 270, n. 12, into the State's election apparatus. See 394 U. S., at 818 (citing *Classic* and *Smith*); *MacDougall* v. *Green*, 335 U. S. 281, 288 (1948) (Douglas, J., dissenting). See also Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 457 (1965) (statement of Rep. Bingham) ("It is clear that political party meetings, councils, conventions, and referendums which lead to endorsement or selection of candidates who will run in primary or general elections are, in most instances, a vital part of the election process") (citing *Smith* and *Terry*).

VI

JUSTICE KENNEDY and JUSTICE THOMAS reject our construction of § 5 for a number of reasons, none of which is convincing. They rely primarily on the argument that, under a literal reading of the statutory text, a political party is not a "State or political subdivision" within the meaning of § 5 because it is not a unit of government. See *post,* at 253–276 (THOMAS, J., dissenting); *post,* at 248–250 (KENNEDY, J., dissenting). The radicalism of this position should not be underestimated. It entirely rejects the distinction between primary elections and conventions that is the centerpiece of the Party's argument. On this view, even if a political party flagrantly discriminated in the selection of candidates whose names would appear on the primary election ballot or in the registration of voters in a primary election, it would not fall within the coverage of § 5. Unsurprisingly, neither the District Court nor the Party advanced this extreme argument, for it is plainly at war with the intent of Congress and with our settled interpretation of the Act.[32]

Almost two decades ago we held in *United States* v. *Sheffield Bd. of Comm'rs* that "§ 5, like the constitutional provisions it is designed to implement, applies to *all entities* having power over any aspect of the electoral process within designated jurisdictions." 435 U. S., at 118 (emphasis added). We understood the phrase "State or political subdivision" to have a "territorial reach" that embraced "actions that are not formally those of the State." *Id.*, at 127. The Court even invoked *Terry* to make its point. 435 U. S., at 127. JUSTICE THOMAS' efforts to confine *Sheffield* and our subsequent decision in *Dougherty* do not make sense of those cases. *Dougherty* held that a county school board qualifies as a "State or political subdivision" even though it is clearly neither "one of the 50 constituent States of the Union," *post,* at 254, nor "a political subdivision" of any such State in a literal sense or as that term is defined in the statute itself.[33] Indeed, a major political party has far more power over the electoral process than a school board, which we conceded has "no nominal electoral functions." *Dougherty,* 439 U. S., at 44.

---

[32] The Party makes passing reference to the idea in its brief, but the surrounding argument makes clear that it only challenges application of the regulation to its nominating activities. See Brief for Appellees 30–40. At oral argument, moreover, the Party confirmed that it believed § 5 could encompass the activities of political parties. See Tr. of Oral Arg. 28–30.

Besides the fact that it contravenes our precedents, this argument fails at the purely textual level. The Voting Rights Act uses the same word as the Fifteenth Amendment—"State"—to define the authorities bound to honor the right to vote. Long before Congress passed the Voting Rights Act, we had repeatedly held that the word "State" in the Fifteenth Amendment encompassed political parties. See *Smith* v. *Allwright; Terry* v. *Adams.* How one can simultaneously concede that "State" reaches political parties under the Fifteenth Amendment, yet argue that it "plainly" excludes all such parties in § 5, is beyond our understanding. Imposing different constructions on the same word is especially perverse in light of the fact that the Act—as it states on its face—was passed to enforce that very Amendment. See *United States* v. *CIO,* 335 U. S. 106, 112 (1948) ("There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged"). Speculations about language that might have more clearly reached political parties are beside the point. It would be a mischievous and unwise rule that Congress cannot rely on our construction of constitutional language when it seeks to exercise its enforcement power pursuant to the same provisions.[34]

---

[33] The statute defines "political subdivision" as a unit of government that registers voters. 42 U. S. C. § 1973*l*(c)(2) (1988 ed.).

[34] JUSTICE KENNEDY and JUSTICE THOMAS nevertheless argue that Congress should have borrowed language from 42 U. S. C. § 1983 if it had intended § 5 to cover political parties. To bolster the point, they cite the "Prohibited acts" provision of the Act, § 11(a), which forbids any "per-

JUSTICE THOMAS makes two other arguments. First, he contends that we should not defer to the Attorney General's regulation when construing the coverage of §5. See *post,* at 258. The argument is surprising because our explanation of why §5 applies to political parties places no reliance on principles of administrative deference. It is nevertheless interesting to note that the regulation has been endorsed by three successive administrations.[35]

---

son acting under color of law" to interfere with the exercise of the right to vote. See 42 U. S. C. §1973i(a) (1988 ed.). It is quite natural, however, that Congress would draw on §1983 when it sought to draft provisions that established individual liability for persons who violate civil rights such as the right to vote. Section 1983 was designed "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe* v. *Pape,* 365 U. S. 167, 172 (1961). Section 11(a) served exactly the same end, and therefore used similar language.

By contrast, Congress would not have looked to §1983 to supply language for §5 for the simple reason that §1983 does not reach the one type of entity Congress most desired §5 to cover: the States themselves. See *Will* v. *Michigan Dept. of State Police,* 491 U. S. 58 (1989). JUSTICE THOMAS tries to avoid this problem by proposing a new, disjunctive statutory phrase that is supposedly clearer than the present §5: "'State or political subdivision or any person acting under color of State law.'" *Post,* at 265 (emphasis deleted). That concatenation of elements, however, appears in no statute ever enacted, so it is unclear why it is preferable to language that had already been construed by this Court. Furthermore, the "person acting under color of state law" locution would be simultaneously too broad and too narrow in that context. Section 5 focuses not on actions that individuals carry out, but on voting practices that organizations enact or implement. Ordinary "persons" do not create and implement voting practices. At the same time, the "plain meaning" of the word "person" does not include political parties. While "person" can be read more broadly, so can "State," as our precedents show. Finally, if "person" reached nonnatural entities, it would become partly redundant with the word "State," which the dissent itself concedes encompasses political units smaller than States. See *Sheffield*; *Dougherty*. In short, it is hardly surprising that Congress opted for the language of the Constitution rather than JUSTICE THOMAS' concocted phrase.

[35] JUSTICE THOMAS is unwilling to accept our representation as to the reasoning underlying our decision; he goes on at great length about our

Second, relying principally on *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974), and *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149 (1978), JUSTICE THOMAS argues that a major political party is not a "state actor" unless its nominees are virtually certain to win the general election. See *post*, at 264–276. Thus, the Party would be a state actor if Virginia allowed only its candidates' names to appear on the ballot, but if the privilege of ballot access (or a preferred position) is reserved to two parties, neither is performing a public function when it selects its nominees. Given JUSTICE THOMAS' reliance on cases construing the reach of the Fourteenth Amendment, the argument seems to challenge both the constitutional power of Congress to prohibit discrimination in the Party's selection of its nominees for federal office and our construction of the statute.

To the extent the argument addresses the constitutionality of the Act, it is wholly unconvincing. *Jackson* held that a private utility did not act "under color of any statute . . . of any State" within the meaning of 42 U. S. C. § 1983 when it terminated a customer's electric service. *Flagg Bros.* held that a warehouseman did not violate § 1983 when it sold goods that were entrusted to it for storage. In both cases, this Court concluded that the defendants were not acting under authority explicitly or implicitly delegated by the State when they carried out the challenged actions. In this case, however, as we have already explained, *supra*, at 195–200, the Party acted under the authority conferred by the Virginia election code. It was the Commonwealth of Virginia—indeed, *only* Virginia—that had the exclusive power to reserve one of the two special ballot positions for the

---

treatment of the regulation, claiming that we "displac[e]" § 5 with it, *post*, at 258, n. 4; that we "substitut[e]" it as the "analytical starting point" of the case, *post*, at 262; and that by considering it we somehow prejudge the question presented, *post*, at 263. None of these assertions is accurate. We begin our discussion of the case by analyzing the regulation for the simple reason that the District Court rested its decision on that ground, and the Party argues that the regulation supports its position.

Party.[36] Moreover, unlike cases such as *Jackson* and *Flagg Bros.*, this is a case in which Congress has exercised the enforcement power expressly conferred to it by § 2 of the Fifteenth Amendment. That power unquestionably embraces the authority to prohibit a reincarnation of the white primaries, whether they limit the field of viable candidates to just one as in *Terry*, or to just two as would be permissible under JUSTICE THOMAS' construction of the Act.

To the extent the argument addresses the coverage of the Act, it is equally unconvincing. As we have already explained, the legislative history of the Act makes it perfectly clear that Congress did not intend to limit the application of § 5 to nominating procedures that "foreordained" the results of the general election. After the statute was enacted, the majority opinions in *Jackson* and *Flagg Bros.* included language that may limit the reach of the constitutional holdings in the White Primary Cases. Those later opinions, however, shed no light on the intent of the Congress that had already enacted the Voting Rights Act and unambiguously expressed a purpose to have it apply to the candidate selection process. While JUSTICE THOMAS would narrowly confine the coverage of the Act to practices that prevent a voter at a general election from casting a ballot and having it counted, see *post*, at 278 (citing the concurrence in *Holder* v. *Hall*, 512 U. S. 874 (1994)), we have no doubt that Congress intended to prohibit the dominant political parties from engaging in discriminatory practices in primary elections as well as conventions of the character involved in this case.

---

[36] While JUSTICE THOMAS relies heavily on JUSTICE O'CONNOR's dissenting opinion in *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991), he overlooks the fact that the Court's holding in that case makes it clear that state delegation of selection powers to two adversaries instead of just one state actor does not preclude a finding of state action. The *Edmonson* dissent argued that since peremptory strikes are available to both opposing sides in a lawsuit, the State cannot simultaneously advance each party's use. The dissent reasoned, therefore, that the State is "neutral" as to their use and not "'responsible'" for it. *Id.*, at 643. Virginia, on the other hand, grants automatic ballot access to only two entities, and requires everyone else to comply with more onerous requirements. As we have shown, Virginia gives a host of special privileges to the major parties, including automatic access, preferential placement, choice of nominating method, and the power to replace disqualified candidates. See *supra*, at 195–197, and nn. 10–13. It is perfectly natural, therefore, to hold that Virginia seeks to advance the ends of both the major parties.

In his separate dissent, JUSTICE KENNEDY accuses us of adopting a "blanket rule" that all political parties must preclear all of their "internal procedures." See *post*, at 250, 251. That characterization is quite inaccurate. We hold that political parties are covered under § 5 only in certain limited circumstances: here, only insofar as the Party exercises delegated power over the electoral process when it charges a fee for the right to vote for its candidates. It is JUSTICE KENNEDY who proposes the "blanket rule" that political parties are *never* covered under the Act, no matter what functions they perform and no matter what authority the State grants them. As we have explained, on that construction even situations involving blatant discrimination by political parties of the kind not seen since the White Primary Cases would fail to trigger the preclearance requirement.

JUSTICE KENNEDY downplays the significance of this drastic limitation by arguing that voters who face electoral discrimination could sue under the Fifteenth Amendment. But lawsuits are no substitute for the preclearance requirement; if they were, § 5 would be superfluous for governmental units, too. As we have explained, the fundamental purpose of the preclearance system was to "shift the advantage of time and inertia from the perpetrators of the evil to its victims," *South Carolina* v. *Katzenbach*, 383 U. S., at 328, by declaring all changes in voting rules void until they are cleared by the Attorney General or by the District Court for the District of Columbia. JUSTICE KENNEDY's construction would reimpose the very burden § 5 was designed to relieve—the necessity of relying on "case-by-case litigation" to protect the right to vote. *Ibid.*

JUSTICE KENNEDY argues that this would be a "much different" case if the State "restructured its election laws in order to allow political parties the opportunity to practice unlawful discrimination in the nominating process." *Post,* at 252. On his view, however, without any restructuring at all, the Party could now take advantage of Virginia's present election laws to perform the same discriminatory acts. It is simply inaccurate, moreover, to claim that the State had undertaken such legislative efforts in each of the White Primary Cases. The Jaybirds in *Terry* began discriminating against minority voters as early as 1889, and, as we have explained, they operated entirely outside the framework of Texas' electoral laws. Finally, it is highly counterintuitive to rely on cases such as *Smith* and *Terry* for the proposition that voters affected by discrimination should sue the State rather than the political party that carries it out, for those cases were actions against parties, not the State.

What JUSTICE KENNEDY apparently finds most objectionable in our decision is the idea that political parties must seek preclearance from the Attorney General of the United States, because she is a "political officer," *post,* at 251. Pursuant to § 5, the Attorney General is entrusted with the statutory duty of determining whether submitted changes have the purpose or will have the effect to discriminate. The suggestion implicit in JUSTICE KENNEDY's opinion, that we should avoid our construction of § 5 because the Attorney General might subvert her legal responsibility in order to harass a political party, is quite extraordinary and unsupported by even a shred of evidence. In any event, any political party distrustful of the Attorney General may seek preclearance under § 5 from the District Court for the District of Columbia.

VII

Appellees advance two practical objections to our interpretation of § 5: that it will create an administrative nightmare for political parties as well as the Department of Justice by requiring preclearance of a multitude of minor changes in party practices; and that it threatens to abridge associational rights protected by the First Amendment. Each of these objections merits a response.

With respect to the first, it is important to emphasize the limitations spelled out in the Attorney General's regulation. To be subject to preclearance a change must be one "affecting voting." Examples of changes that are not covered include "changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms." 28 CFR § 51.7 (1995). The line between changes that are covered and those that are not may be difficult to articulate in the abstract, but given the fact that the regulation has been in effect since 1981 and does not appear to have imposed any unmanageable burdens on covered jurisdictions, it seems likely that the administrative concerns described by the Party are more theoretical than practical.[37] Indeed, past cases in which we were required to construe the Act evoked similar protestations that the advocated construction would prove administratively unworkable. See *Dougherty County Bd. of Ed.* v. *White,* 439 U. S., at 54 (Powell, J., dissenting); *United States* v. *Sheffield Bd. of Comm'rs,* 435 U. S., at 147–148 (STEVENS, J., dissenting). Those fears were not borne out, and we think it no more likely that these will either.

---

[37] This conclusion is buttressed by the fact that in most covered jurisdictions party candidates are selected in primary elections which are admittedly subject to the preclearance requirement. Apparently, Alabama and Virginia are the only two States covered by the Act that authorize the use of conventions to nominate candidates for statewide office. See Council of State Governments, Book of the States 217–218 (1994–1995 ed.).

We also note that States may remove themselves from the special provisions of the Act, such as preclearance, by means of the bailout mechanisms provided in § 4. Several States and political subdivisions initially designated for coverage have successfully availed themselves of these procedures. See, *e. g.*, S. Rep. No. 94–295, p. 35 (1975) (citing bailouts by Alaska; Wake County, North Carolina; Elmore County, Idaho; and Apache, Navajo, and Coconino Counties, Arizona).

With respect to the second argument, we wholeheartedly agree with appellees that the right of association of members of a political party "is a basic constitutional freedom" and that "governmental action that may have the effect of curtailing freedom to associate is subject to the closest scrutiny." Brief for Appellees 25 (citing *Buckley* v. *Valeo,* 424 U. S. 1 (1976), and *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449 (1958)). Such scrutiny, however, could not justify a major political party's decision to exclude eligible voters from the candidate selection process because of their race; the Fifteenth Amendment and our cases construing its application to political parties foreclose such a possibility. See *Smith* v. *Allwright,* 321 U. S., at 657 (rejecting argument that Democratic Party of Texas, as a private voluntary association, could exclude black voters from its primary); *Eu* v. *San Francisco County Democratic Central Comm.,* 489 U. S. 214, 232 (1989) (justifying legislative "intervention" in internal party affairs where "necessary to prevent the derogation of the civil rights of party adherents") (citing *Smith*).

Moreover, appellees have not argued that the registration fee at issue in this case—which is challenged because it curtails the freedom of association of eligible voters arguably in conflict with the interests protected by the Twenty-fourth Amendment—is itself protected by the First Amendment. Rather, they have suggested that hypothetical cases unrelated to the facts of this case might implicate First Amendment concerns that would foreclose application of the preclearance requirement. It is sufficient for us now to respond that we find no constitutional impediment to enforcing § 5 in the case before us.[38] We leave consideration of hypothetical concerns for another day.[39]

---

[38] We recognize that there is a narrow category of exceptional cases in which litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973). Because a claim of facial overbreadth, if successful, is such "strong medicine," the doctrine "has been employed by the Court sparingly and only as a last resort." *Id.*, at 613. Specifically, as is the case with § 5 of the Voting Rights Act, "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.*, at 615. The breadth and importance of the legitimate sweep of § 5 have been demonstrated in a long and unbroken line of decisions applying its preclearance requirements to covered jurisdictions. Even among political parties, it is undisputed that the right of associative freedom would not provide a defense to many practices condemned by § 5. See *Smith*, 321 U. S., at 657; *Eu*, 489 U. S., at 232. Cf. *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 237 (1986) (SCALIA, J., dissenting) (the State "may lawfully require that significant elements of the democratic election process be democratic—whether the Party wants that or not"). Presumably that is why appellees have not argued that § 5 is invalid on its face. Unlike JUSTICE SCALIA, we do not believe that the possibility that some future application of the statute might violate the First Amendment justifies a departure from our "traditional rules governing constitutional adjudication." 413 U. S., at 610.

We also disagree with his assertion that the requirement that the Party preclear a change in practices that imposes a registration fee on voters seeking to participate in the nomination process is a "classic prior restraint." It imposes no restraint at all on speech. Given the past history of discrimination that gave rise to the preclearance remedy imposed by § 5, the minimal burden on the right of association implicated in this case is unquestionably justified.

[39] Relying on statements in appellees' brief, rather than anything in the record, JUSTICE THOMAS suggests that the registration fee was intended to avoid the danger that funding the convention with contributions from a few major donors would enable a small group of contributors to exercise

VIII

The District Court dismissed appellants' claim under § 10 of the Act because that section only authorizes enforcement proceedings brought by the Attorney General and does not expressly mention private actions.[40] While that ruling might have been correct if the Voting Rights Act had been enacted recently, it fails to give effect to our cases holding

---

undue influence over the candidate selection process. See *post*, at 283. The argument is ironic, to say the least, given the evidence that the supporters of the successful candidate for the Party's nomination were willing to pay a delegate's registration fee in return for that delegate's vote. See App. 7–8 (Complaint ¶¶ 21–34).

[40] As originally enacted, § 10 provided, in part:

"SEC. 10. (a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

"(b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

"(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited." 79 Stat. 442.

that our evaluation of congressional action "must take into account its contemporary legal context." *Cannon* v. *University of Chicago*, 441 U. S. 677, 698–699 (1979); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 381 (1982).

Our holding in *Cannon*, that Title IX of the Education Amendments of 1972 created a private right of action for victims of discrimination in education, relied heavily on the fact that during the 1960's the Court had consistently found such remedies notwithstanding the absence of an express direction from Congress. 441 U. S., at 698; see also *id.*, at 718 (REHNQUIST, J., concurring). Indeed, *Cannon* cited and relied on our earlier decision in *Allen* v. *State Bd. of Elections*, 393 U. S. 544 (1969), holding that private parties may enforce § 5 of the Voting Rights Act, to show that Congress acted against a "backdrop" of decisions in which implied causes of action were regularly found. See 441 U. S., at 698, and nn. 22–23. The Voting Rights Act itself was passed one year after this Court's decision in *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), which applied a highly liberal standard for finding private remedies.

In *Allen* we made two observations about § 5 that apply as forcefully to § 10. We noted that "achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." 393 U. S., at 556. The same is surely true of § 10.[41] Second, we attached significance to the fact that the Attorney General had urged us to find that private litigants may enforce the Act. *Id.*, at 557, n. 23. The United States takes the same position in this case. See Brief for United States as *Amicus Curiae* 25–27.[42]

---

[41] In a footnote we observed that a private litigant could always bring suit under the Fifteenth Amendment, but it was the inadequacy of just those suits for securing the right to vote that prompted Congress to enact the statute. See 393 U. S., at 556, n. 21. Similarly with respect to a poll tax, the fact that a suit might be brought directly under the Twenty-fourth Amendment is not a reason for declining to find a statutory remedy.

Congress has not only ratified *Allen*'s construction of §5 in subsequent reenactments, see H. R. Rep. No. 91–397, p. 8 (1970), but extended its logic to other provisions of the Act. Although §2, like §5, provides no right to sue on its face, "the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965." S. Rep. No. 97–417, at 30 (citing *Allen*); see also H. R. Rep. No. 97–227, p. 32 (1981). We, in turn, have entertained cases brought by private litigants to enforce §2. See, *e. g.*, *Chisom* v. *Roemer*, 501 U. S. 380 (1991); *Johnson* v. *De Grandy*, 512 U. S. 997 (1994). It would be anomalous, to say the least, to hold that both §2 and §5 are enforceable by private action but §10 is not, when all lack the same express authorizing language.

Appellees argue that while §5 creates substantive rights, §10 merely directs the Attorney General to bring certain types of enforcement actions. Brief for Appellees 42–43. Exactly the same argument was made as to §5 in *Allen*. But we held there that it was "unnecessary to reach the question" whether §5 created new rights or only gave plaintiffs new remedies to enforce existing rights, for "[h]owever the Act is viewed, the inquiry remains whether the right or remedy has been conferred upon the private litigant."[43] 393 U. S., at 556, n. 20. Even if it mattered whether § 10 created rights or remedies, the other provisions of the Act indicate that the antipoll tax provision established a right to vote without paying a fee.[44]

---

[42] JUSTICE THOMAS attempts to distinguish §5 and §10 by arguing that the former describes a "particular class of persons" to be benefited while the latter does not. See *post*, at 287. JUSTICE THOMAS has it backwards. Section 5 states generically that "no person shall be denied the right to vote" by unprecleared changes. With far greater specificity, §10 states that poll taxes preclude "persons of limited means" from voting or impose unreasonable financial hardships on them and "in some areas ha[ve] the purpose or effect of denying persons the right to vote because of race or color." 42 U. S. C. §1973h(a). It also declares that "the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting." *Ibid.* Section 10 was clearly designed to benefit a limited class of individuals.

Furthermore, when Congress reenacted and extended the life of the Voting Rights Act in 1975, it recognized that private rights of action were equally available under § 10. Section 3, for example, originally provided for special procedures in any action brought "under any statute to enforce the guarantees of the fifteenth amendment" by the Attorney General. See 79 Stat. 437. In 1975, Congress amended that section to cover actions brought by "the Attorney General *or an aggrieved person.*" 42 U. S. C. § 1973a (1988 ed.) (emphasis added). The Senate Report explained that the purpose of the change was to provide the same remedies to private parties as had formerly been available to the Attorney General alone. See S. Rep. No. 94–295, pp. 39–40 (1975).[45] Since § 10 is, by its terms, a statute designed for enforcement of the guarantees of the Fourteenth and Fifteenth Amendments, see 42 U. S. C. § 1973h(b) (1988 ed.), Congress must have intended it to provide private remedies.

---

[43] We do not know, therefore, what JUSTICE THOMAS means when he describes § 5 as conferring a "statutory privilege" on a group of individuals. See *post*, at 287. If that phrase refers to a "right," then JUSTICE THOMAS is flatly wrong, for *Allen* itself denies reaching that question. The "guarantee of § 5" to which *Allen* refers is simply its holding that individuals can sue under § 5. It is circular to rely on that conclusion to distinguish § 5 from § 10, for the question presented here is precisely whether this Court should apply the same logic to § 10.

[44] See § 12(a) (prescribing sanctions for any deprivation or attempted deprivation of "any *right* secured by section . . . 1973h [§ 10]"), 42 U. S. C. § 1973j(a) (1988 ed.) (emphasis added); § 12(c) (prescribing sanctions for any conspiracy to interfere with "any *right* secured by section . . . 1973h [§ 10]"), 42 U. S. C. § 1973j(c) (1988 ed.) (emphasis added).

[45] The Senate Report went on to explain more generally: "In enacting remedial legislation, Congress has regularly established a dual enforcement mechanism. It has, on the one hand, given enforcement responsibility to a governmental agency, and on the other, has also provided remedies to private persons acting as a class or on their own behalf. The Commit-

The same logic applies to § 14(e), added in 1975, which allows attorney fees to be granted to "the prevailing party, *other than the United States,*" in any action "to enforce the voting guarantees of the fourteenth or fifteenth amendment." 42 U. S. C. § 1973*l*(e) (1988 ed.) (emphasis added). Obviously, a private litigant is not the United States, and the Attorney General does not collect attorney's fees.[46] Both this section and § 3 thus recognize the existence of a private right of action under § 10.[47]

Last, appellees argue that § 10 does not apply to the Party's nominating convention because a delegate registration fee is not a poll tax. This argument addresses the merits rather than the right to sue. Without reaching the merits, the District Court dismissed appellants' claim because it held there was no private cause of action under § 10. Since we

---

tee concludes that it is sound policy to authorize private remedies to assist the process of enforcing voting rights." S. Rep. No. 94–295, at 40.

[46] The Senate Report states: "Such a provision is appropriate in voting rights cases because there, as in employment and public accomodations *[sic]* cases, and other civil rights cases, Congress depends heavily upon private citizens to enforce the fundamental rights involved. Fee awards are a necessary means of enabling private citizens to vindicate these Federal rights." *Ibid.*

[47] Appellees argue that any congressional action taken in 1975 cannot support the existence of an implied private right of action because this Court began applying a stricter test for implied rights in *Cort* v. *Ash,* 422 U. S. 66 (1975). We note that *Cort* was decided on June 17, 1975, while the amendments to the Act were passed on August 6 of the same year. Pub. L. 94–73, 89 Stat. 400. Seven weeks—in the context of a bill that was first proposed more than a year earlier—is scarcely enough time for Congress to take account of a change in the "contemporary legal context," especially one whose nature and impact were the subject of some dispute at the time. See *Cannon* v. *University of Chicago,* 441 U. S. 677, 739–743 (1979) (Powell, J., dissenting) (arguing that *Cort relaxed* the standards for finding implied rights of action).

hold that this conclusion is incorrect, we postpone any consideration of the merits until after they have been addressed by the District Court.[48]

The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE O'CONNOR and JUSTICE SOUTER join, concurring in the judgment.

One historical fact makes it particularly difficult for me to accept the statutory and constitutional arguments of the appellees. In 1965, to have read this Act as excluding all political party activity would have opened a loophole in the statute the size of a mountain. And everybody knew it. They knew that, despite the enactment of the Fourteenth and Fifteenth Amendments, African-Americans had been systematically deprived of the right to vote in many places and for many years. They knew, too, that States had tried to maintain that status quo through the "all-white" primary—a tactic that tried to avoid the Fifteenth Amendment by permitting white voters alone to select the "all-white" Democratic Party nominees, who were then virtually assured of victory in the general election. Once the Supreme Court held unlawful the "all-white" primary, *Smith* v. *Allwright*, 321 U. S. 649 (1944), the obvious next step would have been to substitute an "all-white" preprimary Democratic Party nominating process for the "all-white" primary. And, indeed, that is just what happened, though the tactic failed because the Supreme Court held one version of it, the Jaybird Association straw poll, unconstitutional. *Terry* v. *Adams*, 345 U. S. 461 (1953).

---

[48] Appellees make one final argument that this case is moot because the 1994 convention has already been held. We note, however, that the Party has not disavowed the practice of imposing a delegate filing fee for its nominating convention, nor has it returned the $45 collected from appellant Morse. Indeed, the Party has required fees as far back as 1964, and continues to assert that they are necessary to finance its conventions. Like other cases challenging electoral practices, therefore, this controversy is not moot because it is "capable of repetition, yet evading review." *Anderson* v. *Celebrezze*, 460 U. S., at 784, n. 3; *Storer* v. *Brown*, 415 U. S. 724, 737, n. 8 (1974); *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969).

In 1965, Congress knew this history well, see, *e. g.*, H. R. Rep. No. 439, 89th Cong., 1st Sess., pp. 6–22 (noting White Primary Cases and discussing failure of case-by-case enforcement of Fifteenth Amendment); S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3 (1965) (same); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308–315 (1966) (summarizing legislative history), and it knew more besides. It knew that Mississippi had just sent to the Democratic National Convention an "all-white" delegation, selected in a process of party precinct meetings, caucuses, and conventions from which "Negroes" were excluded. See, *e. g.*, Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., pp. 456–457 (1965) (testimony of Rep. Bingham) (hereafter H. R. 6400 Hearings). How is it possible that a Congress, knowing this obvious history, would have wanted to enact a "voting rights" law containing a major and obvious loophole that would allow such practices to continue, thereby threatening to destroy in practice the very promise of elementary fairness that the Act held out?

The answer is that Congress did not want to enact a statute with that loophole, and it did not do so. That is why Representative Bingham said, in offering the amendment that brought voting for "party office" within the Act, see 42 U. S. C. § 1973*l*(c)(1) (1988 ed.), that

> "to be most effective, [the Act] should include express coverage of party functions which directly, or indirectly, affect the primary or general elections in any State." H. R. 6400 Hearings, at 457.

See also *ibid.* (explaining proposal as covering "political party meetings, councils, conventions, and referendums which lead to endorsement or selection of candidates who will run in primary or general elections"). And it is why he told the full House of Representatives (after the Committee had accepted his amendment) that his change

> "would extend the protections of the bill to the type of situation which arose last year when the regular Democratic delegation from Mississippi to the Democratic National Convention was chosen through a series of Party caucuses and conventions from which Negroes were excluded." 111 Cong. Rec. 16273 (1965).

See also H. R. Rep. No. 439, *supra*, at 32.

Representative Bingham's amendment, as the dissents point out, applies only to actions taken by "State or political subdivision." 42 U. S. C. § 1973c (1988 ed.). But that language did not *automatically* place a party's all-white evasive maneuvers beyond the statute's reach, because the Supreme Court had already held that the word "State" as it appears in the Fifteenth Amendment could constitutionally apply to certain activities of political parties, such as nominating activities. See *Smith, supra*, at 662–666; *Terry, supra*, at 473 (opinion of Frankfurter, J.) ("The application of the prohibition of the Fifteenth Amendment to 'any State' is translated by legal jargon to read 'State action' "). The question before us is whether in 1965 Congress *intended* its words to place even a party's convention-based, all-white evasive maneuvers beyond the statute's reach, thereby ignoring even the Mississippi Democratic Party's efforts the year before to use an "all-white" convention process to help nominate a candidate for President of the United States.

The answer to this question must be "no." In light of history—that of Jim Crow and that of the Act—one cannot understand Congress as having intended to endorse any such evasion. And that is as far as we need go to answer the statutory question presented by this case.

We need not go further in determining when party activities are, in effect, substitutes for state nominating primaries because the case before us involves a nominating convention that resembles a primary about as closely as one could imagine. The convention (but for the $45 fee) was open to any voter declaring loyalty to the Republican Party of Virginia (Party), just like a primary. The Party itself had previously selected the primary method to choose its nominee (in 1990, the year of the immediately preceding United States Senate race, the Party canceled its scheduled primary when no candidate filed to oppose the incumbent, App. 24), but changed its mind in 1994 without asking the Justice Department to "preclear" the switch. And the Party chose to avail itself of special state-law preferences, in terms of ballot access and position, offered to the convention's choice. Va. Code Ann. §§24.2–511(A), 535, 613 (1993).

Nor need we go further to decide just which party nominating convention practices fall within the scope of the Act. There are already substantial limits as to which voting-related "practices and procedures" must be precleared. See *Presley* v. *Etowah County Comm'n*, 502 U. S. 491, 502–503 (1992) (gathering cases and setting out four preclearance categories: changes involving "the manner of voting[,] . . . candidacy requirements and qualifications[,] . . . the composition of the electorate that may vote[,] . . . [and] the creation or abolition of an elective office"). Thus, for example, the Party here states that besides nominating candidates, "other business at its conventions" includes "adoption of resolutions or platforms outlining the philosophy [of the Party]" and rules governing its internal operation. App. 24. Under *Presley*, these activities are very likely not subject to preclearance. See also 28 CFR §51.7 (1995) (making clear that "changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement").

I would note, moreover, that the lower courts have applied §5 only to a small subcategory of party rules. See *Hawthorne* v. *Baker*, 750 F. Supp. 1090, 1094–1095 (MD Ala. 1990) (three-judge court), vacated as moot, 499 U. S. 933 (1991); *Fortune* v. *Kings County Democratic County Committee*, 598 F. Supp. 761, 764–765 (EDNY 1984) (three-judge court) *(per curiam); MacGuire* v. *Amos*, 343 F. Supp. 119, 121 (MD Ala. 1972) (three-judge court) *(per curiam)*.

While these limitations exclude much party activity—including much that takes place at an assembly of its members—I recognize that some of the First Amendment concerns raised by the dissents may render these limits yet more restrictive in the case of party conventions. But the practice challenged here—the fee—lies within the Act, and well outside the area of greatest "associational" concern. Like the more obviously evasive "all-white" devices, it is of a kind that is the subject of a specific constitutional Amendment. U. S. Const., Amdt. 24, §1 (banning poll tax).

We go no further in this case because, as the dissents indicate, First Amendment questions about the extent to which the Federal Government, through preclearance procedures, can regulate the workings of a political party convention, are difficult ones, see, *e. g., Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214 (1989), as are those about the limits imposed by the state-action cases. See *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991). Those questions, however, are properly left for a case that squarely presents them.

Such questions, we are satisfied, are not so difficult as to warrant interpreting this Act as containing a loophole that Congress could not have intended to create. See, *e. g., Terry* v. *Adams*, 345 U. S. 461 (1953); *Smith* v. *Allwright*, 321 U. S. 649 (1944). See also *Eu, supra*, at 232 (recognizing that the First Amendment, while guaranteeing associational rights, does not bar "intervention . . . necessary to prevent the derogation of the civil rights of party adherents"); *Presley, supra,* at 502–503 (setting out which voting-related practices are subject to preclearance); Brief for Appellees 6–7 (agreeing § 5 reaches certain primary-related party activity).

An interpretation of §§ 5 and 14(c)(1), in light of the language, history, and purpose of the Act, sufficient to avoid that loophole is sufficient to answer the question presented here. In this case, I conclude that this Court has not decided the exact boundaries that the Constitution draws around the subcategory of party rules subject to § 5. Further definition should await another day.

Finally, I agree with JUSTICE STEVENS that Congress must be taken to have intended to authorize a private right of action to enforce § 10 of the Act, 42 U. S. C. § 1973h (1988 ed.). He explains, *ante,* at 231–232, that the rationale of *Allen* v. *State Bd. of Elections,* 393 U. S. 544, 556–557 (1969) (Congress established private right of action to enforce § 5), applies with similar force not only to § 2 but also to § 10. Cf. S. Rep. No. 97–417, pt. 1, p. 30 (1982) (implied private right of action to enforce § 2 "has been clearly intended by Congress since 1965"). The differences in statutory language and structure between §§ 5 and 10 are not determinative. *Ante,* at 232. In addition, I do not know why Congress would have wanted to treat enforcement of § 10 differently from enforcement of §§ 2 and 5, particularly after 1975. In that year, Congress focused on § 10, deleted the then-obsolete § 10(d), made technical amendments to § 10(b), and thereby indicated its belief that § 10 remained an important civil rights provision. Pub. L. 94–73, § 408, 89 Stat. 405. See also S. Rep. No. 94–295, pp. 40–41 (1975) (reiterating general importance of private enforcement of Act); H. R. Report No. 94–196, pp. 33–34 (1975) (same). For these reasons, I believe Congress intended to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5. I express no view as to the merits of the underlying § 10 claim.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

"Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250 (1957). For that reason, we have always treated government assertion of control over the internal affairs of political parties—which, after all, are simply groups of like-minded individual voters—as a matter of the utmost constitutional consequence. See, *e. g., Democratic Party of United States* v. *Wisconsin ex rel. La Follette,* 450 U. S. 107, 121–122 (1981); *Cousins* v. *Wigoda,* 419 U. S. 477, 487–488 (1975); *O'Brien* v. *Brown,* 409 U. S. 1, 4–5 (1972) *(per curiam).* What is at issue in this case, therefore, is not merely interpretation of § 5 of the Voting Rights Act, 42 U. S. C. § 1973c, but, inextricably bound up with that interpretation, the First Amendment freedom of political association.

There are several respects in which both JUSTICE STEVENS' opinion and JUSTICE BREYER's opinion concurring in the judgment constitute remarkable departures from the settled course of our First Amendment jurisprudence. The most obvious, perhaps, is their refusal to consider the present application of § 5 unconstitutional on the basis of "hypothetical cases unrelated to the facts of this case [that] might implicate First Amendment concerns." STEVENS, J., *ante,* at 228.[1] Instead, they "leave consideration of hypothetical concerns for another day," *ante,* at 229, and reserve such "difficult" questions "for a case that squarely presents them," BREYER, J., *ante,* at 239. That is a luxury our precedents do not allow. It has been a constant of our free-speech jurisprudence that claimants whose First Amendment rights are affected may challenge a statute, not merely on the ground that its specific application to them is unconstitutional, but also on the ground that its application is void in a substantial number of other contexts that arguably fall within its scope. This principle of "overbreadth" has been applied not only in the context of freedom of speech narrowly speaking, but also in the context of the freedom to associate for the purpose of political speech. See, *e. g.*, *United States* v. *Robel*, 389 U. S. 258, 265–266 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11, 18–19 (1966).

---

[1] For brevity's sake, I cite each of today's opinions by the name of its author.

Thus, to satisfy oneself that the particular practice challenged here lies "well outside the area of greatest 'associational' concern," BREYER, J., *ante*, at 239, is to take only the first and smallest step in treating the weighty constitutional question posed by application of § 5 to political parties. In this First Amendment context, to "go no further than necessary to decide the case at hand" means going far enough to assure against overbreadth. We must do that whenever "rights of association [are] ensnared in statutes which, by their broad sweep, might result in burdening innocent associations." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973) (citing, *inter alia*, *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589 (1967)). JUSTICE STEVENS does not assert that applying § 5 to party activity passes First Amendment muster except "in the case before us," *ante*, at 229, and JUSTICE BREYER acknowledges that the First Amendment may bar application of § 5 to other convention activity, see *ante*, at 239. Yet despite these indications of overbreadth, neither opinion attempts to provide what our cases require: a "limiting construction or partial invalidation" that will "remove the seeming threat or deterrence to constitutionally protected expression," *Broadrick*, *supra*, at 613.

Besides flouting the doctrine of overbreadth, the opinions' refusal to provide "[f]urther definition" of § 5's application to political parties, BREYER, J., *ante*, at 240, leaves political parties without guidance as to "when [their] activities are, in effect, substitutes for state nominating primaries," *ante*, at

238, and as to "which party nominating convention practices fall within the scope of the Act," *ibid.*[2] Before today, this Court has not tolerated such uncertainty in rules bearing upon First Amendment activities, because it causes persons to refrain from engaging in constitutionally protected conduct for fear of violation. See, *e. g., Baggett* v. *Bullitt,* 377 U. S. 360, 372 (1964). Surely such an effect can be expected here. Party officials will at least abstain from proceeding with *certain* convention activities without notification; and in light of the high degree of uncertainty they may well decide to hold no conventions *at all.*

Another respect in which the Court today diverges from our free-speech jurisprudence is even more astounding, if possible, than its disregard of the doctrines of overbreadth and vagueness. From reading the majority's two opinions, one would surmise that the only constitutional question at issue is whether the First Amendment permits the Federal Government to make unlawful and set aside party rule changes designed to hinder racial minorities' full participation in election-related functions. But this statute does *not* present only that question, any more than a statute establishing a Board of Obscenity Censors, to which films or books must be submitted for approval before publication, presents only the question whether the First Amendment permits the prohibition of obscenity. See, *e. g., Freedman* v. *Maryland,*

---

[2] JUSTICE BREYER apparently thinks that the First Amendment concerns raised by appellees are minimal because many activities engaged in by a party at its convention "are very likely not subject to preclearance." *Ante,* at 238. Of course, a mere "very likelihood" that failure to preclear a particular activity will not result in nullification of the work of the convention is hardly sufficient to induce a party organizer to take the chance. In any event, I find curious the proposition that certain subsidiary determinations of the convention, such as "'adoption of resolutions or platforms outlining the philosophy [of the Party],'" *ibid.,* are not subject to Government oversight, whereas the determination of who may attend the convention—upon which *all* else depends—is subject to Government oversight. That is a good bargain for the tyrant.

380 U. S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963). A point entirely ignored by JUSTICES STEVENS and BREYER is that this case involves a *classic prior restraint.*

Our cases have heavily disfavored all manner of prior restraint upon the exercise of freedoms guaranteed by the First Amendment. Although most often imposed upon speech, prior restraints are no less noxious, and have been no less condemned, when directed against associational liberty (with which, we have said, freedom of speech "overlap[s] and blend[s]," *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley,* 454 U. S. 290, 300 (1981)). See *Thomas* v. *Collins,* 323 U. S. 516, 539–540 (1945); *Carroll* v. *President and Comm'rs of Princess Anne,* 393 U. S. 175, 180–185 (1968); cf. *Healy* v. *James,* 408 U. S. 169, 184 (1972). Today, however, a majority of the Court readily accepts the proposition that § 5 can subject this First Amendment freedom *to a permit system,* requiring its exercise to be "precleared" with the Government even when it is not being used unlawfully. The Court thus makes citizens supplicants in the exercise of their First Amendment rights.

As the five Justices who support the judgment of the Court choose to read this statute, a political party (or at least one that the State has awarded a place on the ballot[3]) can make *no* change in its practices or procedures that might affect a voter's capacity to have his candidate elected—no matter how race neutral in purpose and effect—*unless it first obtains prior clearance by the Government,* see STEVENS, J., *ante,* at 203–207; BREYER, J., *ante,* at 237–239. Any change not precleared—after a proceeding in which the burden rests *on the party* to show *absence* of discriminatory purpose and effect, see *City of Rome* v. *United States,* 446 U. S. 156, 172–173, 183, n. 18 (1980)—can be enjoined. Given that political parties are organized with the near-exclusive purpose of influencing the outcomes of elections, I think it obvious that as construed today, § 5 requires political parties to submit for prior Government approval, and bear the burden of justifying, virtually every decision of consequence regarding their internal operations. That is the most outrageous tyranny. A freedom of political association that must await the Government's favorable response to a "Mother, may I?" is no freedom of political association at all.

---

[3] JUSTICE STEVENS makes much of the fact that the nominee selected by the Republican Party of Virginia, by reason of the outcome of prior elections, had automatically been given a place on the primary ballot, see *ante,* at 195–199, but he also explains his interpretation of § 5 as "follow[ing] directly from our decision in *Terry* [v. *Adams,* 345 U. S. 461 (1953)]," *ante,* at 215, a case in which the private party's nominating election "did not involve the State's electoral apparatus in even the slightest way," *ibid.* JUSTICE BREYER alludes to Virginia's election laws, see *ante,* at 238, but they are plainly incidental to his analysis, see *ante,* at 235–239. So one must assume that what the Court today holds for parties whose nominees are automatically listed is true for other parties as well.

There would be reason enough for astonishment and regret if today's judgment upheld a statute clearly imposing a prior restraint upon private, First Amendment conduct. But what makes today's action astonishing and regrettable beyond belief is that this Court itself is the architect of a prior restraint that the law does not clearly express. And here is yet another respect in which today's opinions ignore established law: their total disregard of the doctrine that, where ambiguity exists, statutes should be construed to avoid substantial constitutional questions. That has been our practice because we presume that "Congress, which also has sworn to protect the Constitution, would intend to err on the side of fundamental constitutional liberties when its legislation implicates those liberties." *Regan* v. *Time, Inc.,* 468 U. S. 641, 697 (1984) (STEVENS, J., concurring in judgment in part and dissenting in part). We have in the past relied upon this canon to construe statutes narrowly, so as not to impose suspect prior restraints. For example, in *Lowe* v. *SEC,* 472 U. S. 181 (1985), we held that a statute requiring all "investment advisors" to register with the

Securities and Exchange Commission, see 15 U. S. C. § 80b–3, does not extend to persons who publish "nonpersonalized" investment advice such as periodic market commentary—thereby avoiding the question whether Congress could constitutionally require such persons to register. *Lowe, supra,* at 190, 204–205, and n. 50. How insignificant that prior restraint when compared with the requirement for preclearance of all changes in self-governance by political parties.

What drives a majority of the Court to find a prior restraint where the text does not demand (or even suggest) it is the notion that it "strains credulity" to think that Congress would enact a Voting Rights Act that did *not* reach political-party activity, STEVENS, J., *ante,* at 217. Congress, the majority believes, "could not have intended" such a result, BREYER, J., *ante,* at 239. I doubt the validity of that perception; the assumption it rests upon—that a legislature never adopts half-way measures, never attacks the easy part of a problem without attacking the more sensitive part as well—seems to me quite false. Indeed, the one-step-at-a-time doctrine that we regularly employ in equal protection cases is based on precisely the opposite assumption. See, *e. g., Williamson* v. *Lee Optical of Okla., Inc.,* 348 U. S. 483, 488–489 (1955).

Moreover, even if one were to accept the majority's question-begging assumption that Congress *must* have covered political-party activity, and even if one were to credit their sole textual support for such coverage, today's decision to impose a prior restraint upon purely private, political-party activity would still be incomprehensible. The sole textual support adduced by the two opinions consists of § 14's reference to elections for "party office," and § 2's reference to "the political processes leading to nomination or election." See STEVENS, J., *ante,* at 207–209; BREYER, J., *ante,* at 236–237. JUSTICE THOMAS gives compelling reasons why these phrases cannot bear the meaning the majority would ascribe, see *post,* at 277–282. But even accepting that they mean what JUSTICES STEVENS and BREYER say, all that the phrase in § 14 shows is that *some portion of the Act* reaches private, political-party conduct; and all that the phrase in § 2 shows is that (at least in some circumstances) *§ 2* does so. *Nothing* in the text, nor anything in the assumption that Congress *must* have addressed political-party activity, compels the conclusion that Congress addressed political-party activity *in the preclearance, prior-restraint scheme of § 5*,[4] which is of course the only question immediately before us. Thus, the only real credulity strainer involved here is the notion that Congress would impose a restraint bearing a "heavy presumption against its constitutional validity," *Bantam Books*, 372 U. S., at 70, in such a backhanded fashion—saying simply "State[s]" and "political subdivision[s]" in § 5, but meaning political parties as well. Because I find that impossible to believe, I respectfully dissent.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, dissenting.

I join Part II of JUSTICE THOMAS' dissent, which demonstrates that § 10 of the Voting Rights Act, 42 U. S. C. § 1973h (1988 ed.), does not create a private right of action, *post*, at 286–289.

With respect to § 5 of the Act, § 1973c, this statutory construction case does not require us to explore the full reach of Congress' substantial power to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments. Cf., *e. g., City of Rome* v. *United States,* 446 U. S. 156, 173–182 (1980). Nor does it present the question whether the rule of attribution we have adopted in the state-action cases would, of its own force and without statutory implementation, extend the guarantees of the Equal Protection Clause to these appellants. The state-action doctrine and case authorities such as *Smith* v. *Allwright,* 321 U. S. 649 (1944), and *Terry* v. *Adams,* 345 U. S. 461 (1953), may be of considerable relevance to equal protection or other constitutional challenges still pending before the District Court, see *ante,* at 191–192 (opinion of STEVENS, J.), but those matters need not be discussed here. It would be unwise to do so; for, with full recognition of the vital doctrine that *Smith, Terry,* and kindred cases elaborate when we confront discrimination in the participatory processes that are the foundation of a democratic society, we have been cautious to preserve the line separating state action from private behavior that is beyond the Constitution's own reach. " 'Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law' and avoids the imposition of responsibility on a State for conduct it could not control." *National Collegiate Athletic Assn.* v. *Tarkanian,* 488 U. S. 179, 191 (1988), quoting *Lugar* v. *Edmondson Oil Co.,* 457 U. S. 922, 936–937 (1982).

---

[4] The Court majority would respond, perhaps, that the phrase "State or political subdivision" in § 5 should be read to have the same meaning that it has in § 2. Of course it normally should. But if the majority fancies itself confronted with the choice between departing from that general rule of construction (which, like all rules of construction, can be overcome by other indication of statutory intent, see, *e. g.*, *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 86–88 (1934)) and violating the inflexible principle that courts should not needlessly interpret a statute to impose a prior restraint upon private political activity, it is not debatable where the outcome must lie. Of course, the imagined conflict between the rule and the principle disappears if "State or political subdivision" is given its natural meaning in *both* § 5 and § 2, subjecting political parties to neither.

It is "unnecessary to traverse that difficult terrain in the present case," *Lebron* v. *National Railroad Passenger Corporation,* 513 U. S. 374, 378 (1995), because § 5 of the Voting Rights Act does not reach all entities or individuals who might be considered the State for constitutional purposes. Congress was aware of the difference between the State as a political, governing body and other actors whose conduct might be subject to constitutional challenge or the congressional enforcement power, and intended § 5 to reach only the former. JUSTICE THOMAS explains why § 5, both by its terms and with the gloss placed on it in *United States* v. *Sheffield Bd. of Comm'rs,* 435 U. S. 110 (1978), does not reach the Republican Party of Virginia's actions. *Post,* at 254–263. Furthermore, Congress demonstrated its ability to distinguish between the State and other actors in the text of the Act itself. Section 11 of the Act makes it unlawful for any "person acting under color of law" to "fail or refuse to permit any person to vote who is entitled to vote under" specified provisions of the Act, or to "willfully fail or refuse to tabulate, count, and report such person's vote," 42 U. S. C. § 1973i(a), and also provides that "[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce . . . any person for voting or attempting to vote," § 1973i(b).

In the context of the Civil Rights Act of 1871, Rev. Stat. § 1979, 42 U. S. C. § 1983 (1988 ed.), which uses similar language to describe the class of individuals subject to its reach ("[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State"), we have said " 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States* v. *Price,* 383 U. S. 787, 794, n. 7 (1966). See also *Lugar* v. *Edmondson Oil Co., supra,* at 929; *Rendell-Baker* v. *Kohn,* 457 U. S. 830, 838 (1982); *West* v. *Atkins,* 487 U. S. 42, 49 (1988); *National Collegiate Athletic Assn.* v. *Tarkanian, supra,* at 182, n. 4; *Hafer* v. *Melo,* 502 U. S. 21, 28 (1991). There is no apparent reason why the "under color of law" requirement of § 11 should not also be considered coterminous with the state-action requirement of the Amendment that statute enforces, and we should infer from Congress' employment of that requirement an intent to distinguish between the State and those other actors to whom governmental status must be imputed in some instances, cf. *Gustafson* v. *Alloyd Co.,* 513 U. S. 561, 568 (1995) (elementary canon of statutory construction to give a term a "consistent meaning throughout the

Act"). Congress knows the difference between regulating States and other actors, and in § 5 chose only to regulate the States.

The First Amendment questions presented by governmental intrusion into political party functions are a further reason for caution before we adopt a blanket rule that preclearance is required on the theory that when Congress used the word "State" it also meant "political party." Sensitive consideration of the rights of speech and association counsels much restraint before finding that a political party is a state actor for purposes of all preclearance requirements. In particular, we have called for circumspection in drawing the state-action line where political parties and their roles in selecting representative leaders are concerned. See *Cousins* v. *Wigoda,* 419 U. S. 477, 483, n. 4 (1975) (reserving question whether national political party's selection of delegates to nominating convention amounts to state action). See also *id.,* at 492–494 (REHNQUIST, J., concurring in result); *O'Brien* v. *Brown,* 409 U. S. 1, 4–5 (1972) *(per curiam)* (staying order that political party seat certain delegates at its national convention and expressing "grave doubts" about Court of Appeals' action in case raising "[h]ighly important" state-action question); *Republican State Central Comm. of Ariz.* v. *Ripon Society Inc.,* 409 U. S. 1222, 1226–1227 (1972) (REHNQUIST, J., in chambers); *Ripon Society, Inc.* v. *National Republican Party,* 525 F. 2d 567, 574–576 (1975) (en banc), cert. denied, 424 U. S. 933 (1976).

Notwithstanding the terse dismissals of these concerns in the opinions that support today's judgment, *ante,* at 228–229 (opinion of STEVENS, J.); *ante,* at 239 (BREYER, J., concurring in judgment), we have recognized before now the important First Amendment values that attach to a political party's "freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of United States* v. *Wisconsin ex rel. La*

Follette, 450 U. S. 107, 122 (1981). These concerns would provide a sound basis for construing an ambiguous reference to the term "State" to avoid constitutional difficulties. See *Miller* v. *Johnson,* 515 U. S. 900, 924–928 (1995) (refusing to defer to Attorney General's interpretation of § 5 that raised equal protection concerns). Cf. *Gregory* v. *Ashcroft,* 501 U. S. 452, 460–464 (1991) (adopting plain statement rule with respect to statutory ambiguity that implicates Tenth Amendment concerns). Given the absence of any ambiguity in the statutory text before us, there is no basis for a grasping and implausible construction of the Act that brings these constitutional problems to the fore.

We are well advised to remember that Congress, too, can contribute in drawing the fine distinctions required in the balancing of associational and participatory rights. Cf. *United States* v. *Lopez,* 514 U. S. 549, 577 (1995) (KENNEDY, J., concurring) ("[I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance"). No such fine distinctions were attempted, I would submit, in this statute; if anything "strains credulity," *ante,* at 217 (opinion of STEVENS, J.), it is that Congress meant to include the Democratic and Republican Parties when it used the simple word "State" in the Voting Rights Act.

The opinions supporting the judgment express concern that cases like *Smith* and *Terry* would not be covered by the Voting Rights Act were the interpretation adopted today to be rejected. To begin with, of course, we should note that the Voting Rights Act was not needed to invalidate the discrimination that occurred in those cases. The Constitution of its own force did that. What we confront here, instead, is a statutory scheme in which entities seeking preclearance must ask a political officer (the Attorney General of the United States) for permission to change various internal procedures. It is a far reach to suppose that Congress required this for ordinary party processes. The White Primary Cases involved ever-increasing efforts on the part of the State itself to camouflage discrimination in the guise of party activity. See *ante*, at 211–213 (opinion of STEVENS, J.). There is no claim in this case that the Commonwealth's statutory policy of allowing the Republican Party (and any other political party that receives at least 10 percent of the vote in either of two preceding elections) the option to nominate by primary or convention, Va. Code Ann. § 24.2–509 (1993), is void on account of the Commonwealth's failure to preclear that policy in accordance with the requirements of § 5. Rather, the argument embraced today is that the Party itself acted in violation of § 5 by failing to preclear the $45 registration fee. We would face a much different case if a State, without first seeking § 5 preclearance, restructured its election laws in order to allow political parties the opportunity to practice unlawful discrimination in the nominating process. If, as seems likely, such a change constituted a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," 42 U. S. C. § 1973c, § 5 would require preclearance by the State. For this reason, appellants' counsel overstated the matter by arguing that if Congress intended to reach only States *qua* States, and not political parties, "the Voting Rights Act would have been strangled at its birth." Tr. of Oral Arg. 12.

Although Congress enacted § 5 to counteract the notorious history of attempts to evade the guarantees of equal treatment in voting, *South Carolina* v. *Katzenbach*, 383 U. S. 301, 327–328 (1966), that history does not give us license to expand the Act's coverage beyond the boundaries of the statutory text, *Presley* v. *Etowah County Comm'n*, 502 U. S. 491, 509 (1992). I would adhere to that text, which reflects a decided intent on Congress' part to reach governmental, not private, entities. With respect, I dissent.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, and with whom JUSTICE KENNEDY joins as to Part II, dissenting.

Two discrete questions of statutory interpretation control appellants' claim under § 5 of the Voting Rights Act: whether the Republican Party of Virginia is a "State or political subdivision" and, if so, whether the fee imposed upon its conventioneers constitutes a procedure "with respect to voting." 42 U. S. C. § 1973c. The plain meaning of the Voting Rights Act mandates a negative answer to both of these questions. The text of the Act also forecloses the availability of a private cause of action under § 10. I therefore dissent.

I

A

Section 5 declares that, "[w]henever a *State or political subdivision* . . . shall enact or seek to administer" any change with respect to voting, it may not institute that change absent preclearance. 42 U. S. C. § 1973c (emphasis added). Only when a "State or political subdivision" promulgates new voting rules is § 5 even arguably implicated. See *United States* v. *Sheffield Bd. of Comm'rs*, 435 U. S. 110, 141 (1978) (STEVENS, J., dissenting) ("As a starting point, it is clear that [§ 5] applies only to actions taken by two types of political units—States or political subdivisions"). Thus, the first issue to be decided here is whether the Republican Party of Virginia is the type of entity that must comply with the preclearance requirement of § 5.

JUSTICE STEVENS does not directly address this threshold question of pure statutory interpretation. He begins with the Attorney General's regulation, rather than with the text of § 5 itself. Cf. *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117, 128 (1991) ("As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us"). In my opinion, the Republican Party of Virginia is not a "State or political subdivision" within the meaning of § 5, and that statute is therefore not triggered in this case.

1

The Voting Rights Act provides no definition of the term "State." When words in a statute are not otherwise defined, it is fundamental that they "will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States,* 444 U. S. 37, 42 (1979). The ordinary meaning of the word "State" does not encompass a partisan group such as the Republican Party of Virginia. Rather, that word—particularly when capitalized—is generally understood to mean one of the 50 constituent States of the Union. See Webster's New International Dictionary 2461 (2d ed. 1957) (defining "State" as "any body of people occupying a definite territory and politically organized under one government, esp. one that is a sovereign, or not subject to external control; . . . Cf. COMMONWEALTH"). Indeed, it nearly belabors the point to explain that, in common parlance, "State" normally refers to a geographical unit of the United States, such as California or Massachusetts. Our own opinions in § 5 cases use the word in this natural fashion. See, *e. g., United States* v. *Sheffield Bd. of Comm'rs, supra,* at 113 (§ 5 "requires that *States, like Alabama,*" preclear new voting rules) (emphasis added); *Hadnott* v. *Amos,* 394 U. S. 358, 365–366 (1969) (§ 5 "provides that whenever *States like Alabama* seek to administer" voting changes, they must preclear) (emphasis added). Even JUSTICE STEVENS employs "State" in its usual sense. See *ante,* at 193 ("*Virginia* is one of the seven *States* to which the § 4 coverage formula was found applicable . . . . The entire *Commonwealth* has been subject to the preclearance obligation of § 5 ever since") (emphasis added).

That the statutory term "State" should be applied in light of its ordinary meaning is reinforced by the Act's definition of the term "political subdivision." Section 14(c)(2) states that "'political subdivision' shall mean any county or parish," with certain exceptions not relevant here. 42 U. S. C. § 1973*l*(c)(2). As appellants' counsel explained at oral argument, the phrase "political subdivision" refers to "particular geographic regions" within a State, such as New York's Westchester County. Tr. of Oral Arg. 15–16. See also *United States* v. *Sheffield Bd. of Comm'rs, supra,* at 128, n. 15 (§ 14(c)(2) "obviously refer[s] to a geographic territory, and the usages of 'political subdivision' in the Act and the legislative history leave no doubt but that it is in this sense that Congress used the term").[1] Given that limited understanding of "political subdivision," it would be odd indeed if the term "State," which immediately precedes "political subdivision," did not have an analogous meaning. The terms "State" and "political subdivision" should both be construed to refer solely to the various territorial divisions within a larger unit of territorially defined government.

There is further statutory evidence to support this interpretation of "State." The Act elsewhere speaks of the "territory" of a State or political subdivision. See, *e. g.,* § 1973b(a)(1)(F) (referring to "such State or political subdivision and all governmental units *within its territory*") (emphasis added). Political parties, of course, are made up not of land, but of people. It is nonsensical to talk of things existing "within [the] territory" of a political party. Also, the definitional section of the Voting Rights Act Amendments of 1970, Pub. L. 91–285, 84 Stat. 316, indicates that Congress uses the word "State" in voting rights statutes to connote geographic territories, not political parties. See 42 U. S. C. § 1973aa–1(h) (defining, for purposes of § 202 of the Extension Act, "[t]he term 'State'" as "each of the several States and the District of Columbia").

---

[1] There is thus no colorable argument in this case that the Party is a "political subdivision" within the meaning of § 14(c)(2); it is not a geographic territory, such as a "county or parish," within a State. Appellants assert no such claim, apparently in recognition of the weakness of the argument. If the Party falls under § 5, it could only be because it is a "State" or state actor, as appellants and the United States maintain. See *infra,* at 264.

A State, of course, cannot "enact or seek to administer" laws without resort to its governmental units. § 1973c. A State necessarily operates through its legislative, executive, and judicial bodies. When the legislature passes a law, or an administrative agency issues a policy directive, official action has unquestionably been taken in the name of the State. Accordingly, voting changes administered by such entities have been governed consistently by § 5. See, *e. g., Allen* v. *State Bd. of Elections*, 393 U. S. 544 (1969) (requiring preclearance of amendments to Mississippi Code enacted by state legislature and bulletin distributed by Virginia Board of Elections). See also *United States* v. *Saint Landry Parish School Bd.*, 601 F. 2d 859, 864, n. 8 (CA5 1979) ("The cases uniformly speak of § 5 as applying to 'enactments,' 'legislation,' 'regulations,' and 'laws'—all actions taken by the governmental authority of state"). Unlike the Virginia General Assembly, however, the Republican Party of Virginia is not an organ of the State through which the State must conduct its affairs, and the Party has no authority to formulate state law. The Party's promulgations thus cannot be within § 5's reach of "any state enactment which alter[s] the election law of a covered State." *Allen* v. *State Bd. of Elections*, *supra*, at 566 (quoted *ante*, at 204).

Although JUSTICE STEVENS points to past preclearance submissions as evidence that § 5 covers political parties, *ante*, at 200–201, n. 18, those submissions are largely irrelevant to the meaning of § 5. It should come as no surprise that once the Attorney General promulgated a regulation expressly covering political parties, 28 CFR § 51.7 (effective Jan. 5, 1981), some of those organizations requested preclearance and the Justice Department processed their requests. Tellingly, JUSTICE STEVENS is able to cite only a handful of party submissions that predate the Attorney General's regulation.[2] This fact confirms what common sense instructs: Most people who read § 5 simply would not think that the word "State" embraces political parties. This commonsense understanding also explains why virtually every one of this Court's § 5 cases has involved a challenge to, or a request for approval of, action undertaken by a State or a unit of state government.[3]

---

[2] JUSTICE STEVENS has discovered five instances of such party submissions. See *ante*, at 200–201, n. 18. Per year, however, at least several thousand preclearance requests are sent to the Attorney General. See, *e. g.*, Annual Report of the Attorney General 161 (1982) ("During the year, over 2,800 submissions involving more than 13,300 voting-related changes were submitted to the Attorney General under Section 5"); Annual Report of the Attorney General 131 (1986) ("During fiscal year 1986, over 3,700 submissions involving more than 20,000 changes were submitted to the Attorney General under Section 5").

[3] See *Presley* v. *Etowah County Comm'n*, 502 U. S. 491 (1992); *Clark* v. *Roemer*, 500 U. S. 646 (1991); *Pleasant Grove* v. *United States*, 479 U. S. 462 (1987); *McCain* v. *Lybrand*, 465 U. S. 236 (1984); *NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166 (1985); *City of Lockhart* v. *United States*, 460 U. S. 125 (1983); *Port Arthur* v. *United States*, 459 U. S. 159 (1982); *Hathorn* v. *Lovorn*, 457 U. S. 255 (1982); *Blanding* v. *DuBose*, 454 U. S. 393 (1982); *McDaniel* v. *Sanchez*, 452 U. S. 130 (1981); *City of Rome* v. *United States*, 446 U. S. 156 (1980); *Dougherty County Bd. of Ed.* v. *White*, 439 U. S. 32 (1978); *Berry* v. *Doles*, 438 U. S. 190 (1978); *United States* v. *Sheffield Bd. of Comm'rs*, 435 U. S. 110 (1978); *Morris* v. *Gressette*, 432 U. S. 491 (1977); *United States* v. *Board of Supervisors of Warren Cty.*, 429 U. S. 642 (1977); *Beer* v. *United States*, 425 U. S. 130 (1976); *Richmond* v. *United States*, 422 U. S. 358 (1975); *Connor* v. *Waller*, 421 U. S. 656 (1975); *Georgia* v. *United States*, 411 U. S. 526 (1973); *Perkins* v. *Matthews*, 400 U. S. 379 (1971); *Hadnott* v. *Amos*, 394 U. S. 358 (1969); *Allen* v. *State Bd. of Elections*, 393 U. S. 544 (1969). See also *Arizona* v. *Reno*, 887 F. Supp. 318 (DDC), appeal dism'd, 516 U. S. 1155 (1996).

Over the last 30 years, we have entertained only two § 5 cases brought against political parties. We vacated one when it became moot on appeal, *State Democratic Executive Committee of Alabama* v. *Hawthorne*, 499 U. S. 933 (1991), and summarily affirmed the denial of relief in the other. *Williams* v. *Democratic Party of Georgia*, Civ. Action No. 16286 (ND Ga., Apr. 6, 1972), aff'd, 409 U. S. 809 (1972).

In light of the plain meaning of the phrase "State or political subdivision," I see no reason to defer to the Attorney General's regulation interpreting that statute to cover political parties. See 28 CFR § 51.7 (1995). Though the Party has not challenged the validity of the regulation, it hardly follows that this Court is bound to accept it as authoritative. We defer to the Attorney General on statutory matters within her authority "only if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Presley* v. *Etowah County Comm'n,* 502 U. S. 491, 508 (1992). As explained, § 5 on its face resolves the question whether political parties are subject to the preclearance rule of § 5: A political party is simply not a "State," regardless of the particular activity in which it might be engaging. Congress has conveyed its intent to limit § 5 to the States themselves and their political subdivisions. Accordingly, the regulation warrants no judicial deference. Cf. *id.*, at 508–509 (declining to defer to Attorney General's construction of § 5).[4]

My reading of § 5 is squarely supported by our only precedent on the applicability of § 5 to political parties, *Williams* v. *Democratic Party of Georgia,* Civ. Action No. 16286 (ND Ga., Apr. 6, 1972), aff'd, 409 U. S. 809 (1972). *Williams* held, as a matter of "statutory construction," Civ. Action No. 16286, at 5, that § 5 does not apply to political parties. The District Court stated that "[t]he Act does not refer to actions by political parties but refers to actions by a '*State or political subdivision.*'" *Id.*, at 4. Though the District Court believed, based on legislative history, that Congress probably meant to include the election of party delegates under the Act, the court felt itself bound by the fact that § 5 addresses only actions of the State. This limitation was further evidenced, in the court's view, by § 5's provision that preclearance be sought by "the chief legal officer or other appropriate official of such State or subdivision." 42 U. S. C. § 1973c. The District Court concluded that the State itself had "no connection" with the delegate selection process other than providing for the public filing of the rules for selection, and that, though the action of the Party might be "state action" in the constitutional sense, § 5 could not be read so broadly. Civ. Action No. 16286, at 5. Essential to the judgment of the District Court in *Williams* was the holding that § 5 does not encompass political parties. The affirmance of that holding, which is entitled to precedential weight, is instructive here.[5]

---

[4] JUSTICE STEVENS contends that the foregoing discussion is "surprising because [his] explanation of why § 5 applies to political parties places no reliance on principles of administrative deference." *Ante,* at 222. By presupposing that the regulation is a valid interpretation of § 5, however, JUSTICE STEVENS simply assumes that § 5 could cover political parties. Thus, he does not just defer to the Attorney General's reading of § 5, but displaces § 5 with the regulation. Cf. *Presley* v. *Etowah County Comm'n, supra,* at 508 ("Deference does not mean acquiescence"). For the reasons given above, I would not do the same.

Contrary to the suggestion of JUSTICE STEVENS, *United States* v. *Sheffield Bd. of Comm'rs,* 435 U. S. 110 (1978), does not support the contention that the Republican Party of Virginia is subject to § 5. See *ante,* at 204, 219. The precise question presented in that case was whether § 5 required the city of Sheffield, Alabama, to preclear a voting change. The controversy arose because § 14(c)(2) of the Act defines "political subdivision" as a county or parish, "except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U. S. C. § 1973*l*(c)(2). Notwithstanding the facts that the city was not a county or parish and that it did not register voters, the Court concluded that the city was subject to the preclearance requirement of § 5. The essence of *Sheffield's* rationale was that because the entire State of Alabama was designated for coverage pursuant to § 4(b), the city of Sheffield was covered by § 5 because it was a "political unit" (though not a "political subdivision") within Alabama. 435 U. S., at 127–128.

---

[5] JUSTICE STEVENS' attempt to distinguish, and even to draw support from, *Williams* is unpersuasive. See *ante,* at 201–203. The fact that Virginia grants ballot access to the Party's nominee in this case does not establish state involvement in the nominating convention. In holding its convention, the Party exercised no state-delegated power. See *infra,* at 269–276. Further, JUSTICE STEVENS mischaracterizes *Williams* when he declares that the "only" reason that the District Court did not require preclearance was because no adequate administrative procedures existed; the *Williams* court noted that the lack of such procedures buttressed its premise that § 5 applies only to States and political subdivisions. Civ. Action No. 16286, at 4. Finally, 28 CFR § 51.23(b) (1995), which now provides that party officials may submit rules for preclearance, cannot change the language of § 5, which is still limited, as it was at the time *Williams* was decided, to States and political subdivisions.

Whether or not *Sheffield* was correct as an original matter, it stands, at most, for the proposition that a local unit of government, like a city, may be considered the "State" for purposes of § 5: "[Section] 5 . . . applies territorially and includes political units like Sheffield whether or not they conduct voter registration." *Id.*, at 130. In accordance with that proposition, we have applied *Sheffield* to find coverage of other types of governmental bodies under § 5. See, *e. g.*, *Dougherty County Bd. of Ed.* v. *White*, 439 U. S. 32, 45 (1978) (finding § 5 coverage of county school board under *Sheffield* and noting that "[i]f only those *governmental units* with official electoral obligations actuate the preclearance requirements of § 5," the purposes of the Act could be undermined) (emphasis added). But we have never applied *Sheffield* to find a nongovernmental organization to be within the scope of § 5. This is because *Sheffield* says little about the question whether a group that does not operate in the name of the State, or in the name of any governmental unit of a State, must comply with § 5. If anything, *Sheffield* suggests, with respect to this case, that a political party is *not* so obligated, because a political party is quite plainly neither a territorial division of a State nor a governmental unit acting on behalf of any such territory.

Undoubtedly, *Sheffield* speaks in broad terms when it states that § 5 "applies to all entities having power over any aspect of the electoral process within designated jurisdictions, not only to counties or to whatever units of state government perform the function of registering voters." 435 U. S., at 118 (quoted *ante,* at 204, 220). That language must be viewed in the context of the case, however. The holding of *Sheffield* applies only to governmental bodies within a State—*i. e.,* cities, counties, or municipalities, and their agencies—not to private groups with a partisan, or "political," agenda. See, *e. g., Sheffield,* 435 U. S., at 117 ("We first consider whether Congress intended to exclude from § 5 coverage *political units, like Sheffield,* which have never conducted voter registration"); *id.,* at 124 ("Congress could not have intended § 5's duties to apply only to those *cities* that register voters"); *ibid.* ("local political entities *like Sheffield*" can impair minority votes in ways other than registration) (all emphases added). In the legislative history *Sheffield* cites as support for its holding that "political units" are covered regardless of whether they register voters, every entity mentioned is a governmental one. See *id.,* at 133–134 (cities; school districts; city councils; precincts; county districts; and municipalities). There is no basis in *Sheffield* and its progeny for covering nongovernmental entities under § 5.

Nonetheless, there is a critical similarity between this case and *Sheffield.* Just as in *Sheffield,* a majority of the Court has inflated the phrase "State or political subdivision" to implausible proportions. The dissent in *Sheffield* warned that "the logistical and administrative problems inherent in reviewing *all* voting changes of *all* political units strongly suggest that Congress placed limits on the preclearance requirement." *Id.,* at 147 (STEVENS, J., dissenting). Today, the Justices that support the judgment go much further and require all "established" political parties, *ante*, at 219, in designated States to preclear all changes "'affecting voting,'" *ante*, at 227. See also *ante*, at 238 (BREYER, J.) (suggesting that political groups that receive state-law preferences in access to, and placement on, the ballot must preclear "voting-related" changes). As the Solicitor General candidly acknowledged, an "affecting-voting" or "voting-related" rule cannot be limited to practices administered at conventions; it logically extends to practices at all local mass meetings that precede conventions. See Brief for United States as *Amicus Curiae* 20, n. 11. And almost all activity that occurs at a nominating convention theoretically affects voting; indeed, JUSTICE STEVENS is unable to articulate any principled dividing line between that which does and does not relate to voting at a convention. See *ante*, at 227. Thus, today's decision will increase exponentially the number of preclearance requests, for even the most innocuous changes, that the Attorney General must process within a statutorily limited amount of time. See 42 U. S. C. § 1973c (60 days). "[I]t is certainly reasonable to believe that Congress, having placed a strict time limit on the Attorney General's consideration of submissions, also deliberately placed a limit on the number and importance of the submissions themselves. This result was achieved by restricting the reach of § 5 to enactments of either the States themselves or their political subdivisions." *Sheffield*, *supra*, at 148 (STEVENS, J., dissenting). That the inclusion of political parties under § 5 demeans the preclearance regime and so drastically increases its scope substantially undermines the possibility that Congress intended parties to preclear.

Without so much as a nod to the explicit "State or political subdivision" limitation in § 5, JUSTICE STEVENS substitutes the administrative regulation as the analytical starting point in this case. See *ante*, at 194–195. He apparently does so because the Party failed to challenge the regulation and its counsel stated at oral argument that § 5 could sometimes encompass political parties. See *ante*, at 194–195, 220, n. 32, 222–223, n. 35. We did not take this case to review the District Court's application of the regulation based on the facts of this case, but to decide whether "[§]5 of the Voting Rights Act of 1965 require[s] preclearance of a political party's decision . . . to impose" a fee on conventiongoers. Juris. Statement i. Consequently, appellants and the Government argued that the Party was covered as a "State" under § 5, see n. 7, *infra,* and the Party maintained that § 5 "requires action by a State or political subdivision." Brief for Appellees 29. See also *id.,* at 30 ("A political party is not a subdivision or instrumentality of the government [under *Sheffield*]"). JUSTICE STEVENS and JUSTICE BREYER address the question presented, however, only in the course of dismissing the dissents' arguments, and after they reach their respective conclusions.

Furthermore, the tactical or legal error of a litigant cannot define the meaning of a federal statute. See generally *Sibron* v. *New York,* 392 U. S. 40 (1968). Our duty is to read the statute for ourselves. While the regulation may "unambiguously provid[e] that . . . a political party" must preclear, *ante,* at 194 (opinion of STEVENS, J.), the statute does nothing of the sort, regardless of any submission by the Party. Accordingly, I would decide this case on the ground that the Republican Party of Virginia is not a "State" in the ordinary sense of the word. Its rules and policies should therefore not be subject to § 5.[6]

---

[6] JUSTICE STEVENS rejects this reading of § 5 as being "at war with the intent of Congress and with our settled interpretation of the Act." *Ante,* at 220. First, as explained *supra,* at 256–258, and n. 3, 258–261, there is no precedent for the application of § 5 to nongovernmental units; the issue is anything but "settled." JUSTICE STEVENS errs when he states that "[t]he operative test, we have stated repeatedly, is whether a political party exercises power over the electoral process." *Ante,* at 218. We have never made any such statement, because we have never before addressed the question whether political parties are subject to § 5. Second, JUSTICE STEVENS cites only legislative history as evidence of Congress' "unambiguously expressed . . . purpose" that § 5 should apply to the "candidate selection process." *Ante,* at 224. Section 5, of course, could apply in

2

To the limited extent that JUSTICE STEVENS and JUSTICE BREYER address the triggering language in § 5, they fail to explain adequately how it is that the Party could qualify as a "State or political subdivision" under the Act. By referring to the White Primary Cases, however, they reveal the only conceivable basis in law for deeming the acts of the Party to be those of the State: the doctrine of state action, as developed under the Fourteenth and Fifteenth Amendments.[7] In attempting to establish the relevance of that

---

the context of the "candidate selection process," if the State itself enacted or sought to administer the contested change. But JUSTICE STEVENS points to nothing in § 5, or even in that statute's legislative history, that expresses any intent to include political parties within the meaning of "State or political subdivision." Finally, it is perfectly reasonable to suppose that the term "State" has a different meaning in § 5 than it does in the Fifteenth Amendment. Cf. *ante,* at 221. This Court has affirmed in other contexts that statutory language does not necessarily mean the same thing as parallel language in the Constitution. For instance, "[a]lthough the language of [28 U. S. C. § 1331 (1982 ed.)] parallels that of the 'Arising Under' Clause of Article III, this Court never has held that statutory 'arising under' jurisdiction is identical to Art. III 'arising under' jurisdiction." *Verlinden B. V.* v. *Central Bank of Nigeria,* 461 U. S. 480, 494 (1983). Here, the ordinary-meaning rule of statutory construction, which governs the interpretation of § 5, explains why political parties could be covered under the Fifteenth Amendment, but not under § 5: The commonsense definition of "State" is very different from the complex doctrine of state action that this Court has developed as a matter of constitutional law.

[7] In fact, the Government identified our state-action cases under the Fifteenth Amendment as the justification for the Attorney General's regulation on which JUSTICE STEVENS bases his judgment. Brief for United States as *Amicus Curiae* 10–11. Review of the regulation confirms that it is premised upon the notion that the Party's activities can sometimes be treated as those of the State. See 28 CFR § 51.7 (1995) (referring to "public electoral function" carried out by parties and to parties "acting under authority explicitly or implicitly granted by a covered jurisdiction"). Likewise, appellants relied solely on state-action theory as their rationale for bringing the Party within § 5. See Brief for Appellants 14–20, 24–25.

constitutional doctrine to this statutory case, more by repetition than analysis, both opinions suggest that the meaning of the statutory term "State" in § 5 is necessarily coterminous with the constitutional doctrine of state action. See, *ante*, at 199–200, 210–219, 221 (opinion of STEVENS, J.); *ante*, at 235–237 (BREYER, J., concurring in judgment). I cannot agree.

The text of § 5 does not support this constitutional gloss. There is a marked contrast between the language of § 5 and other federal statutes that we have read to be coextensive with the constitutional doctrine of state action. Specifically, 42 U. S. C. § 1983 has been accorded a reach equivalent to that of the Fourteenth Amendment. See *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 934–935 (1982); *United States* v. *Price*, 383 U. S. 787, 794, n. 7 (1966). That statute provides a cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives any citizen of federal constitutional or statutory rights. 42 U. S. C. § 1983. Section 1983's coverage reasonably extends beyond official enactments of the State, since it expressly provides for coverage of persons who act under authority of the State. If Congress intended to incorporate state-action doctrine into § 5, one would expect § 5 to read more like § 1983. That is, it might require preclearance "whenever a State or political subdivision *or any person acting under color of State law*" seeks to enact voting changes.[8] But § 5 does not read like § 1983.

---

[8] JUSTICE STEVENS argues that this example does not by its terms cover political parties. See *ante*, at 221–222, n. 34. The criticism is beside the point, however, because the example is not intended to demonstrate how Congress could have covered political parties as such; that, of course, could be easily achieved by inserting "political parties" in the opening clause of § 5. Instead, the example is meant to emphasize that there is no textual basis for the conclusion that Congress imported the constitutional doctrine of state action into § 5. Because there is no evidence that Congress did so, JUSTICE STEVENS, as well as JUSTICE BREYER, is wrong to use state-action doctrine as license to read "State" to mean "political party."

The Voting Rights Act does, in fact, contain precisely such language in a different section. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States,* 464 U. S. 16, 23 (1983) (internal quotation marks omitted). Section 11(a) of the Act provides that "[n]o person *acting under color of law* shall fail or refuse to permit any person to vote who is entitled to vote under any provision of [the Voting Rights Act and supplemental provisions] or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote." 42 U. S. C. § 1973i(a) (emphasis added). See also § 1973i(b) ("No person, whether *acting under color of law or otherwise,* shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote") (emphasis added). These provisions of the Act account for the very possibility that seems to motivate the Court's strained interpretation of § 5: that persons acting individually or as part of a group, as opposed to States or political subdivisions through their governmental bodies, will interfere with the right to vote.

I would not, therefore, accept the proposition that the constitutional doctrine of state action defines the breadth of the statutory term "State." Given the clarity of the word "State," together with the facts that Congress has traditionally encompassed the broad category of state action by using the phrase "under color of law," and has done so in other parts of this very Act, it is evident that Congress did not mean to incorporate state-action doctrine in § 5.

3

Even indulging the argument that § 5's coverage extends to all activity that qualifies as state action for constitutional purposes, the Court's further assumption that the actions of the Party in this case are fairly attributable to the State is irreconcilable with our state-action precedents.[9]

JUSTICE STEVENS and JUSTICE BREYER are correct to suggest that, under the White Primary Cases—most notably *Smith* v. *Allwright*, 321 U. S. 649 (1944), and *Terry* v. *Adams*, 345 U. S. 461 (1953)—political parties may sometimes be characterized as state actors. Where they err, however, is in failing to recognize that the state-action principle of those cases "does not reach to all forms of private political activity." *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 158 (1978). Rather, it "encompasses only state-regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of public officials.'" *Ibid.* (quoting *Terry*, *supra*, at 484 (Clark, J., concurring)). Thus, the White Primary Cases do not stand for the categorical rule that political parties are state actors, but only for the proposition that, in limited factual circumstances, a particular political party may be deemed an agent of the State.

This case is not governed by the state-action principle enunciated in either *Smith* or *Terry*. Unlike the primary in *Smith*, the Republican Party of Virginia's convention was not a "'state-regulated electio[n]'" to which the doctrine of state action extends. *Flagg Bros., Inc.* v. *Brooks*, *supra*, at 158. As an initial matter, it is important to recognize that *Smith* is on its face limited to primary elections. That is, *Smith* requires a sufficient degree of state regulation that "the party which is required to follow these legislative directions [is made] an agency of the State *in so far as it determines the participants in a primary election*." 321 U. S., at 663

---

[9] Although JUSTICE STEVENS and JUSTICE BREYER never expressly acknowledge their reliance on state-action theory, each finds it necessary to look to that case law for support. See *ante*, at 199–200, 210–219, 221; *ante*, at 235–237. Indeed, JUSTICE STEVENS' discussion of whether the Party acted under the Commonwealth of Virginia's authority in holding the convention is virtually indistinguishable from state-action analysis. See *ante*, at 194–200.

(emphasis added). In this case, the Party played no role in determining the participants in an election—whether primary, general, or special—but required persons who wished to attend its convention to pay a fee.

But, even assuming that the reasoning of *Smith* applies to conventions as well as actual elections, there is still insufficient state regulation in this case to find that "the party . . . [is] an agency of the State." *Ibid.* In *Smith*, the party was compelled by statute to hold a primary and was subject to myriad laws governing the primary from start to finish. See *id.*, at 653, n. 6, 662–663. By comparison, the amount and burden of the state regulation in this case pale. Appellants point to only two provisions of the Virginia Code that directly regulate nominating conventions. Section 24.2–510 imposes certain deadlines for the nomination of candidates by methods other than a primary. Va. Code. Ann. § 24.2–510 (1993). And once a candidate is selected, § 24.2–511 requires that the party chairman certify the candidate to the State Board of Elections. *Ibid.* While § 24.2–509 permits parties to choose their own method of nomination, it is a purely permissive, not a mandatory, provision; the party is not "required to follow [this] legislative directio[n]." *Smith* v. *Allwright*, 321 U. S., at 663. There exists no "statutory system for the selection of party nominees for inclusion on the general election ballot," *ibid.;* there are only a few relatively minor statutory requirements. In other words, when the party holds its convention to select a candidate, it is party, not state, machinery that is put in gear. Cf. *United States* v. *Classic*, 313 U. S. 299, 318 (1941).[10]

---

[10] While JUSTICE STEVENS believes that the decision in *Smith* did not depend at all upon state regulation of primaries, *ante*, at 199–200, and n. 17, *Smith* is by its terms premised upon the existence of a "statutory system." See *Smith* v. *Allwright*, 321 U. S. 649, 662–664 (1944) (detailing state law relating to primaries and concluding that the "statutory system" in Texas for the selection of party nominees "makes the party which is required to follow these legislative directions an agency of the State"). See also *Terry* v. *Adams*, 345 U. S. 461, 462 (1953) ("While no state law directed [the] exclusion [of blacks from the party's primary], our decision

Nor does coverage of the Party in this case "follo[w] directly from . . . *Terry.*" *Ante,* at 215 (opinion of STEVENS, J.). The three separate opinions that constituted the majority in that case contain little analysis of the state-action question, and there was certainly no theory of state action upon which the majority agreed. See *Flagg Bros., Inc.* v. *Brooks, supra,* at 158, and n. 6. Consequently, the holding in *Terry* has since been rationalized in light of two unique factual predicates: (1) a candidate selection system that foreordained the winner of the general election; and (2) the participation of the State in the intentional evasion of the Constitution for the purpose of discrimination. See *Edmonson* v. *Leesville Concrete Co.,* 500 U. S. 614, 625 (1991) ("The Jaybird candidate was certain to win the Democratic primary and the Democratic candidate was certain to win the general election"); *Mobile* v. *Bolden,* 446 U. S. 55, 64 (1980) (explaining *Terry* on grounds that "[t]he candidates chosen in the Jaybird primary . . . invariably won in the subsequent Democratic primary and in the general election" and that "there was agreement that the State was involved in the purposeful exclusion of Negroes from participation in the election process"). The nub of *Terry* was that the Jaybird primary was the *de facto* general election and that Texas consciously permitted it to serve as such; thus, the exclusion of blacks from that event violated the Fifteenth Amendment.

This case involves neither of the operative premises of *Terry.* First, there is no hint of state involvement in any purposeful evasion of the Constitution. No one—not the litigants, the Government, or the court below—has so much as suggested that the Party, in concert with the State, held a convention rather than a primary in order to avoid the constitutional ban on race-based discrimination. Nor has anyone implied that the Party had any intent to discriminate on the basis of race when it decided to charge a fee to cover

---

[in *Smith*] pointed out that many party activities were subject to considerable statutory control").

the costs of the convention.[11] Second, it simply cannot be maintained that exclusion from the Party's 1994 convention was tantamount to exclusion from the general election. The fact that the Party's 1994 nominee for the United States Senate *lost* the general election is proof enough that the modern-day Republican Party in Virginia does not have the stranglehold on the political process that the Democratic Party of Texas had in the 1940's.[12] In short, this case is a far cry from *Terry*, and it does not fall within the bounds of state action delineated, albeit none too clearly, by *Terry*.[13]

In any event, subsequent decisions of this Court have "carefully defined" the scope of *Smith* and *Terry*. *Flagg Bros., Inc.* v. *Brooks*, 436 U. S., at 158. As we have refined our state-action jurisprudence, the White Primary Cases have come to stand for a relatively limited principle. When political parties discharge functions "traditionally performed" by and "'exclusively reserved to'" government, their actions are fairly attributable to the State. *Ibid.* (quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 352 (1974)). See *Edmonson* v. *Leesville Concrete Co.*, *supra*, at 621 (citing *Terry* as a case in which "the actor is performing a traditional governmental function"); *Lugar* v. *Edmondson Oil Co.*, 457 U. S., at 939 (citing *Terry* as illustration of "the 'public function' test"). In *Terry*, the Jaybirds performed the traditional and exclusive state function of conducting what was, in effect, the actual election.

---

[11] It is true, as JUSTICE STEVENS states, that potential for discrimination is the prevailing test for preclearance under § 5. See *ante*, at 216–217, and n. 29. But that is a different question from whether the Party's conduct rises to the level of state action under *Terry*, the issue I address here.

[12] JUSTICE STEVENS claims that, under *United States* v. *Classic*, 313 U. S. 299 (1941), "[v]oting at the nomination stage is protected regardless of whether it 'invariably, sometimes or never determines the ultimate choice of the representative.'" *Ante*, at 218. *Classic* did not so hold. Even assuming that *Classic* applies to conventions as well as primaries, that case merely stated, in dicta, that "where the primary is by law made an integral part of the election machinery," 313 U. S., at 318, the right to participate in a primary does not turn upon the dispositive nature of the primary. Party nominating conventions in Virginia have not been merged by law with the election machinery of the State. See *supra*, at 269 and this page. Contrary to what JUSTICE STEVENS says, *ante*, at 218–219, n. 31, the petition procedure at issue in *Moore* v. *Ogilvie*, 394 U. S. 814 (1969), was by law made a part of the State's electoral system: It was expressly mandated by state statute. See *id.*, at 815 (citing Ill. Rev. Stat., c. 46, § 10–3 (1967)).

[13] In light of *Smith* and *Terry*, JUSTICE BREYER concludes that the word "State" does not "automatically place a party's all-white evasive maneuvers beyond [§ 5's] reach." *Ante*, at 237 (emphasis deleted). That, however, is not this case. As discussed above, there is no basis in fact for inferring that the Party charged the fee as a strategy for producing an "'all-white' convention process" or as a method of evading the Constitution. *Ibid.* And the record in no way suggests that the three law students challenging the fee are black.

In applying the public function test, "our holdings have made clear that the relevant question is not simply whether a private group is serving a 'public function.'" *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 842 (1982) (citation omitted). Instead, "[w]e have held that the question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Ibid.* As JUSTICE O'CONNOR explained the White Primary Cases, "the government functions in these cases had one thing in common: exclusivity." *Edmonson* v. *Leesville Concrete Co.*, 500 U. S., at 640 (dissenting opinion). Thus, in order to constitute state action under the public function test, "private conduct must not only comprise something that the government traditionally does, but something that *only* the government traditionally does." *Ibid.*

The Party's selection of a candidate at the convention does not satisfy that test. As we stated in *Flagg Bros., Inc.* v. *Brooks*, "the Constitution protects private rights of association and advocacy with regard to the election of public officials" and it is only "the conduct of the elections themselves [that] is an exclusively public function." 436 U. S., at 158 (citing *Terry*). Thus, we have carefully distinguished the "conduct" of an election by the State from the exercise of private political rights within that state-created framework. Providing an orderly and fair process for the selection of public officers is a classic exclusive state function. As the Constitution itself evidences, the organization of the electoral process has been carried out by States since the founding: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U. S. Const., Art. I, § 4, cl. 1.

By contrast, convening the members of a political association in order to select the person who can best represent and advance the group's goals is not, and historically never has been, the province of the State—much less its exclusive province. The selection of a party candidate is not the type of function, such as eminent domain, that is "traditionally associated with sovereignty." *Jackson* v. *Metropolitan Edison Co., supra,* at 353. Cf. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.,* 483 U. S. 522, 545 (1987) (holding that United States Olympic Committee is not a state actor because "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function"); *Blum* v. *Yaretsky,* 457 U. S. 991, 1011–1012 (1982) (holding that nursing home is not a state actor in part because provision of nursing home services is not a traditional and exclusive sovereign function); *Edmonson* v. *Leesville Concrete Co., supra,* at 638–641 (O'CONNOR, J., dissenting) (arguing that exercise of peremptory strikes by litigants in state court is not a government function but a matter of private choice). Though States often limit ballot access to persons who are official party nominees or who meet the requirements for independent candidates, see, *e. g., Storer* v. *Brown,* 415 U. S. 724 (1974), no State to my knowledge has ever held a convention in order to designate a political party's nominee for public office. Indeed, it would subvert the very purpose of democracy if the State possessed sole control over the identification of candidates for elective office.

I therefore fail to see how the selection of a party's candidate for United States Senator is a public electoral function. Cf. *ante,* at 194–195 (opinion of STEVENS, J.).[14]

In asking whether the Party acted under authority of the State in selecting its nominee at the convention, the Court emphasizes that Virginia automatically grants ballot access to the nominees of political parties, as defined by statute. See *ante,* at 195–198; *ante,* at 238 (BREYER, J., concurring in judgment). It does not follow from that fact, however, that "the Party exercised delegated state power when it certified its nominee for automatic placement on Virginia's general election ballot." *Ante,* at 195 (opinion of STEVENS, J.). The formulation of rules for deciding which individuals enjoy sufficient public support to warrant placement on the ballot, and the actual placement of those candidates on the ballot, are indeed part of the traditional power of the States to manage elections. See *Burdick* v. *Takushi,* 504 U. S. 428, 433 (1992). But *these* criteria are established exclusively and definitively by the State of Virginia—*not the Party*—in the Virginia Code. See Va. Code Ann. §§ 24.2–101, 24.2–511 (1993) (providing ballot access for certified nominees of organizations of Virginia citizens that receive, in either of the last two statewide general elections, at least 10 percent of the total votes cast). JUSTICE STEVENS is flatly wrong when he asserts that political parties in Virginia "are effectively granted the power to enact their own qualifications for placement of candidates on the ballot." *Ante,* at 197. Also, it is the Commonwealth of Virginia, not the Party itself, that has eliminated the Party's need to present a petition in support of its candidate. Cf. *ante,* at 197–198; Va. Code Ann. § 24.2–511(D) (1993) ("No further notice of candidacy or petition shall be required of a candidate once the party chairman has certified his name to the State Board [of Elections]"). The Party has no control over the qualifications that determine "who may appear on the ballot." *Ante,* at 198.

---

[14] Contrary to the representation of JUSTICE STEVENS, *ante,* at 194–195, the Party explicitly denies that it engaged in any public electoral function. See Brief for Appellees 30 ("The Virginia statutes cited by the law students do not show the exercise of public electoral functions . . . by the Party").

What the Party does determine is something entirely distinct from the rules for ballot access, but which the Court fails to distinguish: the identity of the person who shall be entitled under state law, as the Party's nominee, to placement on the ballot by the State. In making that determination, the Party sets the "qualifications" necessary for the selection of its candidate. Though the Court conflates these two sets of criteria, the Party's standards for choosing its candidate are wholly separate from the State's standards for ballot access, as set forth in §§ 24.2–101 and 24.2–511 of the Virginia Code. When the Party picks a candidate according to its own partisan criteria, it does not act on behalf of the State. Whatever the reason the Party chooses its nominee, "it is not the government's reason." *Edmonson* v. *Leesville Concrete Co.,* 500 U. S., at 638 (O'CONNOR, J., dissenting). In sum, the selection of a party nominee "forms no part of the *government's* responsibility" in regulating an election. *Id.,* at 639.

To be sure, the Party takes advantage of favorable state law when it certifies its candidate for automatic placement on the ballot. See *ante,* at 195–197, and n. 13 (opinion of STEVENS, J.); *ante,* at 238 (BREYER, J., concurring in judgment). Nevertheless, according to our state-action cases, that is no basis for treating the Party as the State. The State's conferral of benefits upon an entity—even so great a benefit as monopoly status—is insufficient to convert the entity into a state actor. See *Jackson* v. *Metropolitan Edison,* 419 U. S., at 351–352.[15] If appellants believe that the State has created an unfair electoral system by granting parties automatic access to the ballot, the proper course of action is to bring suit against the appropriate state official and challenge the ballot-access statute itself, see, *e. g., Burdick* v. *Takushi, supra,* not to bring a preclearance suit against the Party and contest the registration fee. If the State sought to enact or administer a law limiting ballot access to only one group, as JUSTICE STEVENS repeatedly hypothesizes, see, *e. g., ante,* at 223, state action would most likely exist, and that law would be subject to § 5 and those provisions of the Constitution that impose restrictions on the States.

---

[15] On JUSTICE STEVENS' and JUSTICE BREYER's view of the relationship between automatic ballot placement and state action, many private corporations in Virginia would qualify as state actors. Virginia corporations

As for the point that Virginia allows the Party to choose its method of nomination, that fact does not warrant a finding of state action either. We have made it clear that an organization's "exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action.'" *Jackson* v. *Metropolitan Edison, supra,* at 357. Thus, when the Party exercised the choice afforded it by state law and opted to hold a convention, that decision did not amount to state action. The Party did not take the initiative to make that choice in order to serve the public interest; in reality, the selection of a nomination method is an intensely political matter, as recent

---

are, like most corporations, substantially advantaged by various provisions of state law. See, *e. g.,* Va. Code Ann. §§ 13.1–692.1, 13.1–870.1 (1993) (creating a limitation on liability for corporate officers and directors). I doubt seriously, however, that even the Members of today's majority would hold that when a corporation takes the necessary steps to invoke these statutory benefits, it thereby becomes a state actor; yet this is the logical result of the suggestion that the Party is a state actor because Virginia automatically places its nominee on the ballot. Such a conclusion would run headfirst into our case law, in which we have stated unequivocally that privately owned corporations, absent some symbiotic relationship with the State, are purely private actors. See *Jackson* v. *Metropolitan Edison,* 419 U. S., at 357–358; *Blum* v. *Yaretsky,* 457 U. S. 991, 1011 (1982).

intra-Party disputes over that choice well illustrate.[16] Even if, as might be said here, "[t]he government erects the platform" upon which a private group acts, the government "does not thereby become responsible for all that occurs upon it." *Edmonson* v. *Leesville Concrete Co., supra,* at 632 (O'CONNOR, J., dissenting).[17]

The basis for today's decision, which subjects a political party to the requirements of § 5, can only be state-action doctrine. But treating the Party as an agent of the State in this case is not only wrong as a matter of statutory interpretation, it also squarely contravenes our state-action precedents. In short, there is no legal justification—statutory, constitutional, or otherwise—for the conclusion that the Party is an entity governed by § 5.[18]

---

[16] See Editorial, Primarily Primaries, Richmond Times-Dispatch, Nov. 28, 1995, p. A–8 (describing contentious debate between supporters of the incumbent Virginia Senator and those of his Republican challenger over nomination methods and noting that "[i]t is only human for sides to favor the means—convention or primary—perceived to give their candidate an edge").

[17] With respect to Congress' power to prohibit discrimination in party affairs, see *ante,* at 223–224, it is enough for purposes of this case to note that it is well established that Congress may not regulate purely private behavior pursuant to its enforcement power under the Fourteenth and Fifteenth Amendments. See *James* v. *Bowman,* 190 U. S. 127, 139 (1903) ("[A] statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the State through some one or more of its official representatives"); *Civil Rights Cases,* 109 U. S. 3 (1883).

[18] Indeed, JUSTICE BREYER's concurrence is founded on little more than sheer disbelief that Congress passed a statute that does not go as far in terms of coverage as he thinks, in light of the history of voting rights, the statute should. See *ante,* at 236 ("How is it possible that a Congress, knowing this obvious history, would have wanted to enact a 'voting rights' law containing a major and obvious loophole . . ."). We are not free to construe statutes by wondering about what Congress "would have wanted to enact." There are myriad reasons why measures that "a Congress"—I assume JUSTICE BREYER means a majority of the Members

B

Assuming, *arguendo*, that the Republican Party of Virginia is a "State" within either the ordinary or the constitutional sense of the word, the question remains whether the Party has sought to administer a practice or procedure with respect to "voting." Based on the statutory definition of "voting," I conclude that the registration fee is not the type of election-related change with which the Act concerns itself.

Section 14 of the Act defines voting as "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to . . . casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office." 42 U. S. C. § 1973*l*(c)(1). There is no mention of conventions. Because § 14 specifically enumerates the types of elections covered, but does not

---

of that institution—might "wan[t] to enact" never become law. We must look to the extant text of the statute and see what Congress has in fact, and not in theory, enacted.

In contrast to JUSTICE BREYER's imaginary statute, which covers all actors that might discriminate in the electoral process, § 5 is in reality limited to States and political subdivisions. Thus, the question in this case is not whether we should "read this Act as excluding all political party activity . . . [and] ope[n] a loophole in the statute," *ante*, at 235, but whether we should read § 5 to include such activity in the first place. If there is any "loophole" in § 5 here, it results from the fact that Congress simply did not cover political parties in the preclearance provision. JUSTICE BREYER's argument thus boils down to the curious notion that when Congress passes a statute that covers certain actors, it thereby establishes a "loophole" for all others. Moreover, while Congress was surely aware of the history of discrimination in the political process when it passed the Act, I presume it was also cognizant of the prohibitions of the First Amendment, see *infra*, at 282–285, as well as the constraints on its legislative powers under the Fifteenth Amendment, not the least of which is the state-action requirement. See n. 14, *supra*. Both of these *constitutional* limits on Congress' powers are sufficient reason to curb speculation and to think it "possible" (if the lack of textual evidence were not enough) that Congress did not intend to cover political parties under § 5.

include conventions, the most natural (and logical) inference is that Congress did not intend to include voting at conventions within the definition of "voting."

The omission of conventions from the list of elections covered in § 14 is especially revealing when compared to and contrasted with other federal election laws. The Federal Election Campaign Act of 1971 defines "election" to mean "(A) a general, special, primary, or runoff election; [and] (B) a *convention* or caucus of a political party which has authority to nominate a candidate." 86 Stat. 11, as amended, 2 U. S. C. § 431(1) (emphasis added). Similarly, § 600 of Title 18 criminalizes the promising of employment in exchange for political support "in connection with any general or special election to any political office, or in connection with any primary election or *political convention* or caucus held to select candidates for any political office." 18 U. S. C. § 600 (emphasis added). See also § 601(b)(2) (defining "election" as, *inter alia*, "a *convention* or caucus of a political party held to nominate a candidate") (emphasis added). Congress obviously knows how to cover nominating conventions when it wants to. After all, if there is a field in which Congress has expertise, it is elections.

JUSTICE STEVENS maintains that the fee relates to "voting" because, even though it was not imposed at one of the three types of elections listed in § 14, it diminished the effectiveness of appellants' votes at the general election. See *ante*, at 205–206. As I explained in *Holder* v. *Hall*, 512 U. S. 874 (1994), my view is that "as far as the Act is concerned, an 'effective' vote is merely one that has been cast and fairly counted." *Id.*, at 919 (THOMAS, J., concurring in judgment). Appellants do not contend that they were unable to submit a ballot in the general election or that their votes in that election were not properly registered and counted. I thus would not strain to hold, as do JUSTICES STEVENS and BREYER, that appellants' votes at the general election lacked effect simply because their personal favorite for the Republican nomination was not on the ballot as the Party candidate.

JUSTICE STEVENS also reasons that party primaries and conventions are functionally indistinguishable. See *ante*, at 205–207, 214–215. Similarly, JUSTICE BREYER maintains that the convention in this case "resembles a primary about as closely as one could imagine." *Ante*, at 238. These assertions may or may not be true as a matter of practical judgment (or imagination). One crucial difference between primaries and conventions is that in the context of the former, the party often avails itself of a system erected, funded, and managed by the State, whereas in the latter, it generally does not. Consequently, charging the State with responsibility for voting changes that occur in a primary, where there may be actual state involvement, makes more sense than holding the State accountable for changes implemented at a party convention. Though JUSTICE BREYER lists several reasons why the Party's convention was like a primary, see *ibid.*, he fails to mention the critical factor of state involvement.

In any event, the question whether conventions ought to be governed by the Act is, at bottom, a matter of policy. And, as far as I can discern from the face of § 14, Congress made no policy determination in favor of regulating conventions under the Act. Though one might think it more sensible to include conventions in § 14, "[t]he short answer is that Congress did not write the statute that way." *United States* v. *Naftalin*, 441 U. S. 768, 773 (1979). When we examine the legislative lines that Congress has drawn, we generally do not hold Congress to exceedingly rigorous standards of logic. See, *e. g., FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 314 (1993) (reviewing statute for rational basis under Equal Protection Clause and noting that "'judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted'") (quoting *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979)); *International Primate Protec-*

tion League v. *Administrators of Tulane Ed. Fund,* 500 U. S. 72, 84–85 (1991) (enforcing, in statutory construction case, a distinction based on a "mere technicality" because "Congress could rationally have made such a distinction").

JUSTICE STEVENS is right that "we have held that § 5 applies to cases like *Whitley* v. *Williams,* which involve candidacy requirements and qualifications." *Presley* v. *Etowah County Comm'n,* 502 U. S., at 502; see *ante,* at 206–207. However, those cases all involved qualifications for candidates running in either primary or general elections that are clearly within the scope of § 14. See 502 U. S., at 502. ("In *Whitley* v. *Williams,* there were changes in the requirements for independent candidates running in general elections"). See also *NAACP* v. *Hampton County Election Comm'n,* 470 U. S. 166 (1985) (change in filing deadline to run for school board in general election); *Hadnott* v. *Amos,* 394 U. S. 358 (1969) (change in filing deadline for general election); *Dougherty County Bd. of Ed.* v. *White,* 439 U. S. 32 (1978) (rule requiring school board members to take unpaid leave of absence while campaigning for office, where plaintiff ran in primary and general election). The cases holding that changes in the composition of the electorate are covered by § 5 likewise involve general elections. See *Allen* v. *State Bd. of Elections,* 393 U. S., at 550, 569 (change from district to at-large, general election). Thus, we had no occasion in any of these cases to question whether activity that occurs at a nominating convention, as opposed to a primary, special, or general election, falls under the Act's definition of "voting." Rather, the issue in these cases was whether the contested change had a sufficiently "direct relation to, or impact on, voting," *Presley* v. *Etowah County Comm'n, supra,* at 506, so as to constitute a "practice or procedure with respect to voting" subject to preclearance under § 5. See, *e. g., Allen* v. *State Bd. of Elections, supra,* at 569 (holding that "the enactment in each of these cases constitutes a 'voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting' within the meaning of §5"). Regardless of whether Congress has ever "endorsed these broad constructions of §5," *ante*, at 205, they have no bearing on the meaning of §14.

Nor does the reference to the election of party officials bring the convention within the ambit of §14, as JUSTICE STEVENS and JUSTICE BREYER argue. See *ante*, at 207–208; *ante*, at 236–237. Section 14 does refer to "votes cast with respect to candidates for public or party office." 42 U. S. C. §1973*l*(c)(1) (1988 ed.). But JUSTICES STEVENS and BREYER amputate that phrase from the rest of the sentence, which provides that casting a vote at a "primary, special, or general election" for "candidates for . . . party office" constitutes "voting" for purposes of the Act. See *ibid.* (voting is "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to . . . casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office"). Under §14, then, voting does extend to casting a ballot for a party officer, but only when that ballot is cast at a primary, special, or general election. Since this is obvious on the face of the statute, I see no need to resort to the legislative history of the Bingham Amendment. Cf. *ante*, at 208–209 (opinion of STEVENS, J.); *ante*, at 236–237 (BREYER, J., concurring in judgment). Though Representative Bingham may have had every intention of covering the activities of political parties under §5, there is no evidence that he succeeded in transforming that intention into law.

Finally, as JUSTICE STEVENS notes, §§2 and 5 would appear to be designed to work in tandem. See *ante*, at 209–210. Nonetheless, there is a patent discrepancy between the broad sweep of §2, which refers to "the political processes leading to nomination or election," and the undeniably narrower definition of voting set forth in §14, which is limited to the context of a "primary, special, or general election."

The incongruity appears to be a result of Congress' 1982 amendment of § 2 to expand its reach to pre-election political processes, see Pub. L. 97–205, § 3, 96 Stat. 134, without making any concomitant amendments to either § 5 or § 14. As long as § 5 contains the term "voting," and § 14 in turn defines that word, I think we must adhere to the specific definition provided in § 14. We cannot decline to apply that definition according to its terms simply because we think it would be preferable to harmonize §§ 2 and 5. If the 1982 amendment produced an undesirable inconsistency between §§ 2 and 5, Congress is free to harmonize them.[19]

C

Were I otherwise willing to disregard the plain meaning of §§ 5 and 14, there is another factor counseling strongly against the Court's interpretation of the Act. Holding that the Party's convention fee must be precleared by the Government poses serious constitutional problems. Our standard practice is to avoid constructions of a statute that create such difficulties. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties." *Ibid.*

---

[19] Legislative history is insufficient to bridge this gap in coverage that is apparent on the face of the statutes, as JUSTICE STEVENS would have it. See *ante*, at 210, n. 25. In any case, the legislative history cited by JUSTICE STEVENS is wholly nonresponsive to the issue of which types of entities must submit their rules for preclearance under § 5. That is, the legislative history discusses certain kinds of changes that must be precleared, without suggesting that the entities that must comply with the preclearance requirement are anything other than States and political subdivisions. The part of the Senate Report cited by JUSTICE STEVENS addresses the need to preclear statewide redistricting plans. Reapportionment plans, of course, are usually enacted by state or local legislative bodies. See, *e. g., Beer* v. *United States*, 425 U. S. 130 (1976) (reapportionment plan adopted by city council). The passage in the House Report states that a voting practice that is outside the scope of the preclearance provision (either because it was in existence before 1965 or is implemented in a noncovered jurisdiction) may nonetheless be challenged in a lawsuit under § 2; hence the distinction between preclearance and litigation. The Report thus supports precisely the opposite proposition for which JUSTICE STEVENS cites it: It expressly states that not every action that can be brought under § 2 falls within the scope of § 5.

Among the constitutional questions raised by this decision are ones relating to freedom of political association. "The First Amendment protects political association as well as political expression." *Buckley* v. *Valeo*, 424 U. S. 1, 15 (1976). Political parties, and their supporters, enjoy this constitutional right of political affiliation. *Cousins* v. *Wigoda*, 419 U. S. 477, 487 (1975). "[A]t the very heart of the freedom of assembly and association," is "[t]he right of members of a political party to gather in a . . . political convention in order to formulate proposed programs and nominate candidates for political office." *Id.*, at 491 (REHNQUIST, J., concurring in result). A convention to nominate a party candidate is perhaps the classic forum for individual expression of political views and for association with like-minded persons for the purpose of advancing those views.

We need not look beyond this case to "hypothetical," *ante*, at 228, controversies in order to identify substantial First Amendment concerns. As applied today, §5 burdens the rights of the Party and its members to freedom of political association. The Party has represented in this Court that it decided to charge each delegate a registration fee rather than to fund the convention with contributions from a few major donors in order to avoid undue influence from a small group of contributors. See Brief for Appellees 45–46. Under our precedents, the Party's choice of how to fund its statewide convention seems to be a constitutionally protected one. "The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 224 (1986). See also *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 124 (1981) ("A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution"). As the Court of Appeals for the District of Columbia Circuit has explained, "a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the protection of the Constitution . . . . [T]here must be a right not only to form political associations but to organize and direct them in the way that will make them most effective." *Ripon Society, Inc.* v. *National Republican Party*, 525 F. 2d 567, 585 (1975) (en banc), cert. denied, 424 U. S. 933 (1976) (emphasis deleted). By requiring the Party to seek approval from the Federal Government before it may implement rules regarding the funding of nominating conventions, the Court has burdened the Party's ability to institute the constitutionally protected choice embodied in those rules.

Moreover, if the Attorney General or a federal court were to refuse to preclear the registration fee, the Government would in effect be requiring the Party to include persons who could not, or would not, pay the registration fee for its convention. But, as we have held, "the freedom to associate for the 'common advancement of political beliefs,' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of United States* v. *Wisconsin*, *supra*, at 122 (citation omitted). See also *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 224 (1989). Section 5, under the Court's novel construction, impinges upon that interest. Furthermore, the Court creates a classic prior restraint on political expression, as JUSTICE SCALIA cogently explains. See *ante*, at 243–246.

Legislative burdens on associational rights are subject to scrutiny under the First Amendment. See *Burdick* v. *Takushi*, 504 U. S., at 433–434 (level of scrutiny depends upon severity of the infringement); cf. *Eu*, *supra*, at 225; *Cousins*, *supra*, at 489. Severe interference with protected rights of political association "may [only] be sustained if the [government] demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, *supra*, at 25. Though JUSTICE STEVENS and JUSTICE BREYER glibly dismiss this constitutional inquiry, see *ante*, at 228–229; *ante*, at 239 ("[s]uch questions, we are satisfied, are not so difficult"), it is not equally obvious to me that § 5, as interpreted today, would survive a First Amendment challenge.

JUSTICE STEVENS is correct that, under the White Primary Cases, First Amendment rights of political association cede to the guarantees of the Fifteenth Amendment in certain circumstances. *Ante*, at 228. The Court has held that when state-approved exclusion from a political group is tantamount to exclusion from the actual election, that exclusion violates the Fifteenth Amendment. See *Terry* v. *Adams*, 345 U. S., at 469–470. However, where a person is refused membership in a political organization without any involvement on the part of the State, and membership in the group is not a precondition to participation in the ultimate choice of representatives, there can logically be no state denial of the right to vote. In such a situation, there is no conflict between the First and Fifteenth Amendments.

Exclusion of political parties from the coverage of § 5 obviates the foregoing First Amendment problems. Cf. *Miller* v. *Johnson*, 515 U. S. 900, 926–927 (1995) (rejecting possible reading of § 5 because it raised constitutional problems). By letting stand a construction of § 5 that encompasses political parties, however, the Court begets these weighty First

Amendment issues. Ironically, the Court generates these difficulties by contorting, rather than giving the most natural meaning to, the text of § 5.

II

I also disagree with the Court that § 10 of the Voting Rights Act contains an implicit cause of action for private suits against States and localities that impose poll taxes upon voters. Section 10 states:

> "[T]he Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) of this section and the purposes of this section." 42 U. S. C. § 1973h(b).

By its very terms, § 10 authorizes a single person to sue for relief from poll taxes: the Attorney General. The inescapable inference from this express grant of litigating authority to the Attorney General is that no other person may bring an action under § 10. Though JUSTICE STEVENS contends that implication of a private cause of action is crucial to the enforcement of voting rights, *ante,* at 231, § 10 itself indicates otherwise. Suits instituted by the Attorney General were evidently all that Congress thought "necessary to implement . . . the purposes of this section." *Ibid.* Section 10 explicitly entrusts to the Attorney General, and to the Attorney General alone, the duty to seek relief from poll taxes under the Act.

Although *Allen* v. *State Bd. of Elections,* 393 U. S. 544 (1969), held that § 5 of the Voting Rights Act contains a private right of action, *Allen* does not require the same result under § 10. Section 5 affirmatively proclaims that " 'no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5].'" *Id.*, at 555. It was "[a]nalysis of this language" that "indicate[d] that appellants may seek a declaratory judgment that a new state enactment is governed by § 5." *Ibid.* A private cause of action was thought necessary to effectuate "[t]he guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5." *Id.*, at 557.[20] See also *Cannon* v. *University of Chicago*, 441 U. S. 677, 690 (1979) ("[I]t was statutory language describing the special class to be benefited by § 5 . . . that persuaded the Court that private parties within that class were implicitly authorized to seek a declaratory judgment against a covered State").

Unlike § 5, § 10 creates no statutory privilege in any particular class of persons to be free of poll taxes. The only possible "guarantee" created by § 10 is that the Attorney General will challenge the enforcement of poll taxes on behalf of those voters who reside in poll tax jurisdictions. What § 10 does not do, however, is actually prohibit a State or political subdivision from administering poll taxes. Nor does it declare that no person shall be required to pay a poll tax. Rather, § 10 merely provides, as a "declaration of policy" prefacing the authorization for civil suits, that "the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting." 42 U. S. C. § 1973h(a). It further provides that when a jurisdiction administers a poll tax, the Attorney General may prevent its enforcement by bringing suit in accordance with certain procedural requirements, including a three-judge district court and direct appeal to this Court. See § 1973h(c). Section 10 creates no ban on the imposition of poll taxes, whereas § 5, *Allen* said, guaranteed that no person would be subject to unapproved voting changes. Thus, § 10 confers no rights upon individuals and its remedial scheme is limited to suits by the Attorney General. Cf. *ante,* at 232 (opinion of STEVENS, J.).

---

[20] This language makes clear that the "guarantee" described in *Allen* was not, as JUSTICE STEVENS asserts, "simply its holding that individuals can sue under § 5." *Ante*, at 233, n. 43.

I am unpersuaded by the maxim that Congress is presumed to legislate against the backdrop of our "implied cause of action" jurisprudence. See *Cannon* v. *University of Chicago, supra,* at 698–699; *ante,* at 230–231. That maxim is relevant to but one of the three factors that were established for determining the existence of private rights of action in *Cort* v. *Ash,* 422 U. S. 66 (1975), and that were applied in *Cannon.* See *Cannon* v. *University of Chicago, supra,* at 699 (considering "contemporary legal context" of statute to assess the third *Cort* factor, whether the legislative history reveals an intent to create a cause of action). Though we may thus look to this presumption for guidance in evaluating the history of a statute's enactment, "what must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11, 15–16 (1979). See also *Touche Ross & Co.* v. *Redington,* 442 U. S. 560, 575 (1979). We do this by "begin[ning] with the language of the statute itself." *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* at 16. In my view, § 10—which authorizes only the Attorney General to sue for relief and creates no enforceable right in any person to be free from poll taxes—precludes the inference that Congress intended the availability of implied causes of action under that section.[21]

Finally, the 1975 amendments to the Voting Rights Act do not justify the judicial creation of a private cause of action under § 10. See *ante*, at 233–234 (opinion of STEVENS, J.). Section 3 is a generalized section of the Act, providing three-judge district courts with special authority in adjudicating Voting Rights Act claims. See 42 U. S. C. § 1973a. As appellants accurately state, § 3 "explicitly recognizes that private individuals can sue under the [Act]." Brief for Appellants 41. Section 3 does not, however, identify any of the provisions under which private plaintiffs may sue. The most logical deduction from the inclusion of "aggrieved person" in § 1973a is that Congress meant to address those cases brought pursuant to the private right of action that this Court had recognized as of 1975, *i. e.*, suits under § 5, as well as any rights of action that we might recognize in the future. Section 14(e), which provides for attorney's fees to "the prevailing party, other than the United States," is likewise a general reference to private rights of action. Like § 3, § 14(e) fails to address the availability of a private right to sue under § 10. § 1973*l*(e).[22]

---

[21] Nor do I think that we should imply a cause of action under § 10 simply because we have heard and decided challenges by private plaintiffs under § 2. See *ante,* at 232 (opinion of STEVENS, J.); *ante,* at 240 (BREYER, J., concurring in judgment). We ought not base our decision in this case on the fact that we have inadvertently, and perhaps incorrectly, allowed private suits to proceed under other sections of the Act.

At bottom, appellants complain that unless a private cause of action exists under § 10, private plaintiffs will be forced to challenge poll taxes by bringing constitutional claims in single-judge district courts. This, they contend, "is directly contrary to the special procedures for adjudicating poll tax claims established by Congress in section 10." Brief for Appellants 38. It is appellants' claim, however, that flatly contravenes § 10. The only "special procedure" for litigating poll tax challenges that Congress created in § 10 is an action by the Attorney General on behalf of the United States.

---

[22] It does not follow from Congress' technical amendment of § 10 in 1975, which JUSTICE BREYER takes as an indication that "§ 10 remained an important civil rights provision," *ante*, at 240, that we should imply a cause of action thereunder. A statute outlawing a class of voting practices and authorizing the Attorney General of the United States to sue jurisdictions that engage in such practices is surely an "important" provision, even if not privately enforceable.

* * *

To conclude, I would decide this controversy on the ground that the Republican Party of Virginia is not a "State or political subdivision" for purposes of § 5. This is true whether one invokes the ordinary meaning of the term "State" or even, as the Court erroneously does, the state-action theory of our constitutional precedents. Even if the Party were a "State" or a state actor, the registration fee does not relate to "voting," as defined by § 14. Because the argument for the applicability of § 5 in this case fails at each step, I would not require the Party to preclear its convention registration fee under § 5. Nor would I imply a private right of action under § 10.

Today, the Court cuts § 5 loose from its explicit textual moorings regarding both the types of entities and the kinds of changes that it governs. JUSTICE BREYER, writing for three Members of the Court, does so without attempting to define the limits of § 5's applicability to political parties and their practices. See *ante,* at 238 ("We need not . . . determin[e] when party activities are, in effect, substitutes for state nominating primaries"); *ibid.* ("Nor need we go further to decide just which party nominating convention practices fall within the scope of the Act"). Indeed, JUSTICE BREYER expends much ink evading inevitable questions about the Court's decision. See *ante,* at 239 ("We go no further in this case because, as the dissents indicate, First Amendment questions about the extent to which the Federal Government, through preclearance procedures, can regulate the workings of a political party convention, are difficult ones, as are those about the limits imposed by the state-action cases") (citations omitted). This is not reassuring, and it will not do. Eventually, the Court will be forced to come to grips with the untenable and constitutionally flawed interpretation of § 5 that it has wrought in this case. That encounter, which could easily have been averted today, will involve yet another Voting Rights Act conundrum of our own making.[23]

When leveled against wholly private partisan organizations with respect to their internal affairs, § 5's potential for use as an instrument of political harassment should be obvious to all. I have no doubt that § 5 was never intended for such purposes. Rather, that section was aimed at preventing covered States from intentionally and systematically evading the guarantees of the Voting Rights Act by simply recasting their election laws. This suit, along with the ones certain to follow, trivializes that goal. I respectfully dissent.

---

[23] Apart from the preclearance issues that the Court leaves unresolved, today's judgment raises additional questions under the Voting Rights Act, since the phrase "State or political subdivision" is used in several other key provisions. For instance, may political parties bring a declaratory judgment action under § 5 as an alternative to preclearance? See 42 U. S. C. § 1973c. May political parties bring a "bailout suit" for exclusion from the category of covered jurisdictions? See § 1973b(a). Are political parties subject to suit under § 2? See § 1973(a). Can a three-judge district court authorize the appointment of federal examiners to monitor a political party's activities during the pendency of, and as part of a final judgment in, a voting rights suit? See § 1973a(a). Quite apparently, the Court has not stopped to consider the ramifications of its decision.

RUTLEDGE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 94–8769. Argued November 27, 1995—Decided March 27, 1996

A jury found petitioner guilty of one count of participating in a conspiracy to distribute controlled substances in violation of 21 U. S. C. § 846 and one count of conducting a continuing criminal enterprise (CCE) "in concert" with others in violation of § 848. The "in concert" element of his CCE offense was based on the same agreement as the § 846 conspiracy. The District Court entered judgment of conviction on both counts and imposed a sentence of life imprisonment without possible release on each, the sentences to be served concurrently. Pursuant to 18 U. S. C. § 3013, it also ordered petitioner to pay a special assessment of $50 on each count. The Seventh Circuit affirmed, relying on *Jeffers* v. *United States*, 432 U. S. 137, to reject petitioner's contention that his convictions and concurrent life sentences impermissibly punished him twice for the same offense.

Held: The District Court erred in sentencing petitioner to concurrent life sentences on the § 846 and § 848 counts. Pp. 297–307.

(a) It is presumed that a legislature does not intend to impose two punishments where two statutory provisions proscribe the "same offense." The test for determining whether there are two offenses is whether each of the statutory provisions requires proof of a fact which the other does not. *Blockburger* v. *United States*, 284 U. S. 299, 304. This Court has often concluded that two statutes define the "same offense" where one is a lesser included offense of the other. For the reasons set forth in *Jeffers*, 432 U. S., at 149–150 (plurality opinion); *id.*, at 158, 159, n. 5 (dissenting opinion), and particularly because the plain meaning of § 848's "in concert" phrase signifies mutual agreement in a common plan or enterprise, the Court now resolves definitively that a guilty verdict on a § 848 charge necessarily includes a finding that the defendant also participated in a conspiracy violative of § 846. Conspiracy is therefore a lesser included offense of CCE. Pp. 297–300.

(b) The Court rejects the Government's contention that the presumption against multiple punishments does not invalidate either of petitioner's convictions because the sentence on the second one was concurrent. That conviction amounts to a second punishment because a $50 special assessment was imposed on it. Cf. *Ray* v. *United States*, 481 U. S. 736 (1987) *(per curiam)*. Even if the assessment were ignored, the force of the Government's argument would be limited by *Ball* v. *United States*, 470 U. S. 856, 861–865, in which the Court concluded that Congress did not intend to allow punishment for both illegally "receiving" and illegally "possessing" a firearm; held that the only remedy consistent with the congressional intent was to vacate one of the underlying convictions as well as the concurrent sentence based upon it; and explained that the second conviction does not evaporate simply because of its sentence's concurrence, since it has potential adverse collateral consequences—*e. g.*, delay of parole eligibility or an increased sentence under a recidivist statute for a future offense—that make it presumptively impermissible to impose. Although petitioner did not challenge the $50 assessment below, the fact that § 3013 required its imposition renders it as much a collateral consequence of the conspiracy conviction as the consequences recognized by *Ball*. Pp. 301–303.

(c) Also rejected is the Government's argument that the presumption against multiple punishments is overcome here because Congress has clearly indicated its intent to allow courts to impose them. Support for that view cannot be inferred from the fact that this Court's *Jeffers* judgment allowed convictions under both §§ 846 and 848 to stand, since those convictions were entered in separate trials, the Court's review addressed only the § 848 conviction, and that conviction was affirmed because the four-Justice plurality decided that Jeffers had waived any right to object, see 432 U. S., at 152–154, and because Justice White took the hereinbefore-rejected position that conspiracy was not a lesser included offense of CCE, see *id.*, at 158 (opinion concurring in judgment in part and dissenting in part). As to this issue, then, the judgment is not entitled to precedential weight because it amounts at best to an unexplained affirmance by an equally divided court. Pp. 303–304.

(d) The Government's argument that Congress intended to allow multiple convictions here to provide a "backup" conviction, preventing a defendant who later successfully challenges his greater offense from escaping punishment altogether, is unpersuasive. There is no reason why this particular pair of greater and lesser offenses should present any novel problem not already addressed by the federal appellate courts, which have uniformly concluded—with this Court's approval, see, *e. g.*, *Morris* v. *Mathews*, 475 U. S. 237, 246–247—that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds affecting only the greater offense. Pp. 305–307.

(e) Because the Court here adheres to the presumption that Congress intended to authorize only one punishment, one of petitioner's convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense and must be vacated under *Ball*, 470 U. S., at 864. P. 307.

40 F. 3d 879, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Barry Levenstam argued the cause for petitioner. With him on the briefs were *Jerold S. Solovy*, *Avidan J. Stern*, and *Jacob I. Corré*.

James A. Feldman argued the cause for the United States. With him on the brief were *Solicitor General Days*, *Acting Assistant Attorney General Keeney*, *Deputy Solicitor General Dreeben*, and *Richard A. Friedman*.

JUSTICE STEVENS delivered the opinion of the Court.

A jury found petitioner guilty of participating in a conspiracy to distribute controlled substances in violation of 84 Stat. 1265, as amended, 21 U. S. C. § 846, and of conducting a continuing criminal enterprise (CCE) in violation of § 848. The "in concert" element of his CCE offense was based on the same agreement as the § 846 conspiracy. The question presented is whether it was therefore improper for the District Court to sentence him to concurrent life sentences on the two counts.

I

Petitioner organized and supervised a criminal enterprise that distributed cocaine in Warren County, Illinois, from 1988 until December 1990, when he was arrested by federal agents. He was charged with several offenses, of which only Count One, the CCE charge, and Count Two, the conspiracy charge, are relevant to the issue before us.

Count One alleged that during the period between early 1988 and late 1990, petitioner violated § 848[1] by engaging in a CCE that consisted of a series of unlawful acts involving the distribution of cocaine.[2] The count alleged that these actions were undertaken "in concert with at least five (5) other persons," that petitioner supervised those other persons, and that he obtained substantial income from the continuing series of violations. App. 2–3.

---

[1] Section 848(c) provides:

"(c) 'Continuing criminal enterprise' defined

"For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

Count Two separately alleged that during the same period, petitioner violated 21 U. S. C. § 846[3] by conspiring with four codefendants and others to engage in the unlawful distribution of cocaine. The count alleged that each of the conspirators had furthered the conspiracy by performing an overt act involving the delivery, purchase, or distribution of cocaine. App. 3–5.

After a 9-day trial, a jury found petitioner guilty on all counts. The trial court entered judgment of conviction on both Count One and Count Two and imposed a sentence of life imprisonment without possible release on each count, the sentences to be served concurrently. *Id.*, at 8–10. Pursuant to 18 U. S. C. § 3013, petitioner was also ordered to pay a special assessment of $50 on each count.

"(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

"(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

"(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

"(B) from which such person obtains substantial income or resources." 21 U. S. C. § 848(c).

[2] The alleged unlawful acts included a series of cocaine transactions in violation of § 841(a) and the same conspiracy in violation of § 846 that was charged in Count Two.

[3] "§ 846. Attempt and conspiracy

"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U. S. C. § 846.

On appeal, petitioner contended in a *pro se* supplemental brief that even though the life sentences were concurrent, entering both convictions and sentences impermissibly punished him twice for the same offense. The Court of Appeals for the Seventh Circuit accepted the premise of his argument, namely, that the conspiracy charge was a lesser included offense of the CCE charge. 40 F. 3d 879, 886 (1994). The Court of Appeals nonetheless affirmed his convictions and sentences. Relying on its earlier decision in *United States* v. *Bond,* 847 F. 2d 1233, 1238 (1988), and our decision in *Jeffers* v. *United States,* 432 U. S. 137 (1977), it held that convictions and concurrent sentences may be imposed for conspiracy and CCE, "provided the cumulative punishment does not exceed the maximum under the CCE act." 40 F. 3d, at 886.

The decision of the Seventh Circuit is at odds with the practice of other Circuits. Most federal courts that have confronted the question hold that only one judgment should be entered when a defendant is found guilty on both a CCE count and a conspiracy count based on the same agreements.[4] The Second and Third Circuits have adopted an intermediate position, allowing judgment to be entered on both counts but permitting only one sentence rather than the concurrent sentences allowed in the Seventh Circuit.[5] We granted certiorari to resolve the conflict. 515 U. S. 1157 (1995).

---

[4] See, *e. g., United States* v. *Rivera-Martinez,* 931 F. 2d 148, 153 (CA1), cert. denied, 502 U. S. 862 (1991); *United States* v. *Butler,* 885 F. 2d 195, 202 (CA4 1989); *United States* v. *Neal,* 27 F. 3d 1035, 1054 (CA5 1994), cert. denied, 513 U. S. 1179 (1995); *United States* v. *Paulino,* 935 F. 2d 739, 751 (CA6 1991), cert. denied, 502 U. S. 1036 (1992); *United States* v. *Possick,* 849 F. 2d 332, 341 (CA8 1988); *United States* v. *Hernandez-Escarsega,* 886 F. 2d 1560, 1582 (CA9 1989), cert. denied, 497 U. S. 1003 (1990); *United States* v. *Stallings,* 810 F. 2d 973, 976 (CA10 1989); *United States* v. *Cruz,* 805 F. 2d 1464, 1479 (CA11 1986), cert. denied, 481 U. S. 1006 (1987); *United States* v. *Anderson,* 39 F. 3d 331, 357 (CADC 1994), rev'd on other grounds, 59 F. 3d 1323 (CADC 1995) (en banc).

II

Courts may not "prescrib[e] greater punishment than the legislature intended." *Missouri* v. *Hunter,* 459 U. S. 359, 366 (1983); *Brown* v. *Ohio,* 432 U. S. 161, 165 (1977). In accord with principles rooted in common law and constitutional jurisprudence, see *Ex parte Lange,* 18 Wall. 163, 168–170 (1874), we presume that "where two statutory provisions proscribe the 'same offense,'" a legislature does not intend to impose two punishments for that offense. *Whalen* v. *United States,* 445 U. S. 684, 691–692 (1980); *Ball* v. *United States,* 470 U. S. 856, 861 (1985).

For over half a century we have determined whether a defendant has been punished twice for the "same offense" by applying the rule set forth in *Blockburger* v. *United States,* 284 U. S. 299, 304 (1932). If "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Ibid.* In subsequent applications of the test, we have often concluded that two different statutes define the "same offense," typically because one is a lesser included offense of the other.[6]

---

[5] *United States* v. *Aiello,* 771 F. 2d 621, 634 (CA2 1985); *United States* v. *Fernandez,* 916 F. 2d 125, 128–129 (CA3 1990), cert. denied, 500 U. S. 948 (1991).

[6] See, *e. g., Ball* v. *United States,* 470 U. S. 856, 861–864 (1985) (concluding that multiple prosecutions were barred because statutes directed at "receipt" and "possession" of a firearm amounted to the "same offense," in that proof of receipt "*necessarily*" included proof of possession); *Whalen* v. *United States,* 445 U. S. 684, 691–695 (1980) (concluding that two punishments could not be imposed because rape and felony murder predicated on the rape were the "same offense"); *Brown* v. *Ohio,* 432 U. S. 161, 167–168 (1977) (in multiple proceedings context, applying *Blockburger*

In this case it is perfectly clear that the CCE offense requires proof of a number of elements that need not be established in a conspiracy case.[7] The *Blockburger* test requires us to consider whether the converse is also true—whether the § 846 conspiracy offense requires proof of any element that is not a part of the CCE offense. That question could be answered affirmatively only by assuming that while the § 846 conspiracy requires proof of an actual agreement among the parties, the "in concert" element of the CCE offense might be satisfied by something less.

The Government advanced this precise argument in *Jeffers* v. *United States,* 432 U. S. 137 (1977),[8] but it managed to persuade only one Justice. *Id.,* at 158 (White, J., concurring). The position was rejected, to varying degrees, by the

---

v. *United States,* 284 U. S. 299 (1932), to confirm state-court conclusion that offense of "joyriding" was a lesser included offense of auto theft).

[7] The defendant must, for example, commit a series of substantive violations, be a leader of the criminal enterprise, and derive substantial income from it. The Government need not prove any of those elements to establish a conspiracy in violation of § 846. Even the "in concert" element of the CCE offense is broader than any requirement in § 846 because it requires at least five participants, while a conspiracy requires only two.

[8] In *Jeffers,* we considered whether the Government could prosecute the defendant under § 848 even though he had previously been convicted of § 846 conspiracy on the basis of the same agreements. The Government argued that the multiple prosecution was permissible because the crimes were not the "same offense." "The Government's position is premised on its contention that agreement is not an essential element of the § 848 offense, despite the presence in § 848(b)(2)(A) of the phrase 'in concert with.' If five 'innocent dupes' each separately acted 'in concert with' the ringleader of the continuing criminal enterprise, the Government asserts, the statutory requirement would be satisfied. Brief for United States 23." 432 U. S., at 147. The Government relied on *Iannelli* v. *United States,* 420 U. S. 770 (1975), in which we construed 18 U. S. C. § 1955 as not requiring proof of conspiracy. As Justice Blackmun pointed out, however, the language of § 1955 was significantly different from § 848 in that it omitted the words "in concert" and left open "the possibility that the five persons 'involved' in the gambling operation might not be acting together." 432 U. S., at 147–148.

other eight. The four dissenters adopted, without comment, the proposition that conspiracy was a lesser included offense of CCE. See *id.*, at 158, 159, n. 5. The remaining Justices joined Justice Blackmun's plurality opinion which, while declining to hold that conspiracy was a lesser included offense,[9] nonetheless explained why the Government's argument was inconsistent with the statute's text, with the way the words "in concert" have been used in other statutes, and with the legislative history of this statute.[10] Based on its understanding of the "more likely" interpretation of § 848, the plurality assumed, *arguendo*, "that § 848 does require proof of an agreement among the persons involved in the continuing criminal enterprise. So construed, § 846 is a lesser included offense of § 848, because § 848 requires proof of every fact necessary to show a violation under § 846 as well as proof of several additional elements." *Id.*, at 149–150.

---

[9] The plurality did not need to hold that conspiracy was a lesser included offense because it found that even if it was, the petitioner waived whatever right he may have had to object to the second prosecution under § 848 when he opposed the Government's motion, brought before the first trial, to consolidate the proceedings. *Id.*, at 149–150, 153–154.

[10] The language of § 848 "restricts the definition of the crime to a continuing series of violations undertaken by the accused 'in concert with five or more other persons.'" *Id.*, at 148. As a result, "a conviction [under § 848] would be impossible unless concerted activity were present. . . . Even if § 848 were read to require individual agreements between the leader . . . and each of the other five necessary participants, enough would be shown to prove a conspiracy." *Ibid.*

Furthermore, "[w]hen the phrase 'in concert' has been used in other statutes, it has generally connoted cooperative action and agreement. . . . This suggests that Congress intended the same words to have the same meaning in § 848. . . . Since the word 'concert' commonly signifies agreement of two or more persons in a common plan or enterprise, a clearly articulated statement from Congress to the contrary would be necessary before that meaning should be abandoned." *Id.*, at 149, n. 14 (citations omitted); see 3 Oxford English Dictionary 658 (2d ed. 1989) (defining "concert" as "[a]greement of two or more persons or parties in a plan, design, or enterprise; union formed by such mutual agreement"; "esp[ecially] in phrase *in concert*"); Webster's Third New International Dictionary 470 (1981) (defining "concert" as "agreement in a design or plan: union formed by mutual communication of opinions and views: accordance in a scheme"). Thus, "[i]n the absence of any indication from the legislative history or elsewhere to the contrary, the far more likely explanation is that Congress intended the word 'concert' to have its common meaning of agreement in a design or plan." *Jeffers*, 432 U. S., at 148–149.

In the years since *Jeffers* was decided, the Courts of Appeals have also consistently rejected the Government's interpretation of the "in concert" language of § 848; they have concluded, without exception, that conspiracy is a lesser included offense of CCE.[11] We think it is appropriate now to resolve the point definitively: For the reasons set forth in *Jeffers*, and particularly because the plain meaning of the phrase "in concert" signifies mutual agreement in a common plan or enterprise, we hold that this element of the CCE offense requires proof of a conspiracy that would also violate § 846. Because § 846 does not require proof of any fact that is not also a part of the CCE offense, a straightforward application of the *Blockburger* test leads to the conclusion that conspiracy as defined in § 846 does not define a different offense from the CCE offense defined in § 848. Furthermore, since the latter offense is the more serious of the two, and because only one of its elements is necessary to prove a § 846 conspiracy, it is appropriate to characterize § 846 as a lesser included offense of § 848.[12]

---

[11] See, *e. g., Rivera-Martinez*, 931 F. 2d, at 152 (CA1); *Aiello*, 771 F. 2d, at 633 (CA2); *Neal*, 27 F. 3d, at 1054 (CA5); *United States* v. *Chambers*, 944 F. 2d 1253, 1268 (CA6 1991), cert. denied, 502 U. S. 1112, *sub nom. Lucas* v. *United States*, 503 U. S. 989 (1992); 40 F. 3d 879, 886 (CA7 1994) (case below); *Possick*, 849 F. 2d, at 341 (CA8); *Hernandez-Escarsega*, 886 F. 2d, at 1582 (CA9); *Stallings*, 810 F. 2d, at 975 (CA10); *United States* v. *Graziano*, 710 F. 2d 691, 699 (CA11 1983).

[12] *Garrett* v. *United States*, 471 U. S. 773, 794–795 (1985), is not to the contrary. There, we affirmed the defendant's prosecution for a CCE violation even though he had previously pleaded guilty to a predicate crime of importing marijuana. *Ibid.* That holding, however, merely adhered to our understanding that legislatures have traditionally perceived a quali-

III

The Government contends that even if conspiracy is a lesser included offense of CCE, the resulting presumption against multiple punishments does not invalidate either of petitioner's convictions. The second conviction, the Government first argues, may not amount to a punishment at all.

We begin by noting that 18 U. S. C. § 3013 requires a federal district court to impose a $50 special assessment for every conviction, and that such an assessment was imposed on both convictions in this case. As long as § 3013 stands, a second conviction will amount to a second punishment. Cf. *Ray* v. *United States*, 481 U. S. 736, 737 (1987) *(per curiam)* (presence of $50 assessment precludes application of "concurrent sentence doctrine"). The Government urges us not to rely on the assessment, however, pointing out that petitioner did not challenge it below, and noting that the question presented "presupposes" fully concurrent sentences. Brief for United States 7, n. 1.

If we ignore the assessment as the Government requests, the force of its argument would nonetheless be limited by our decision in *Ball* v. *United States*, 470 U. S. 856 (1985). There, we concluded that Congress did not intend to allow punishment for both illegally "receiving" and illegally "possessing" a firearm. *Id.*, at 861–864. In light of that conclusion, we held that "the only remedy consistent with the con-

---

tative difference between conspiracy-like crimes and the substantive offenses upon which they are predicated. See, *e. g., United States* v. *Felix*, 503 U. S. 378, 389–390 (1992) (allowing prosecution for conspiracy after petitioner was convicted of underlying substantive offense, and citing *Garrett* as a similar case). No such difference is present here. In contrast to the crimes involved in *Garrett*, this case involves *two* conspiracy-like offenses directed at largely identical conduct. *Jeffers* v. *United States*, 432 U. S., at 157; *Garrett*, 471 U. S., at 794 ("[T]he plurality [in *Jeffers*] reasonably concluded that the dangers posed by a conspiracy and a CCE were similar and thus there would be little purpose in cumulating the penalties").

gressional intent is for the District Court . . . to exercise its discretion to vacate one of the underlying convictions" as well as the concurrent sentence based upon it. *Id.*, at 864. We explained further:

> "The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. See *Benton* v. *Maryland*, 395 U. S. 784, 790–791 (1969); *Sibron* v. *New York*, 392 U. S. 40, 54–56 (1968). Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment." *Id.*, at 864–865.

Under *Ball*, the collateral consequences of a second conviction make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence.

The Government suggests, however, that petitioner will never be exposed to collateral consequences like those described in *Ball* because he is subject to multiple life sentences without possibility of release. We need not conclusively resolve the matter, for there is no doubt that the second conviction carried with it, at very least, a $50 assessment. Although petitioner did not challenge the assessment below, 18 U. S. C. § 3013 required the District Court to impose it, and the assessment was therefore as much a collateral consequence of the conspiracy conviction as the consequences recognized by *Ball* would be. As a result, the conviction amounts to cumulative punishment not authorized by Congress.

IV

The Government further argues that even if the second conviction amounts to punishment, the presumption against allowing multiple punishments for the same crime may be overcome if Congress clearly indicates that it intended to allow courts to impose them. *Hunter*, 459 U. S., at 366 (citing *Whalen*, 445 U. S., at 691–692); *Garrett* v. *United States*, 471 U. S. 773, 779 (1985) (allowing multiple punishment in light of Congress' "plainly expressed" view). The Government submits that such clear intent can be found here.

The Government finds support for its position in this Court's judgment in *Jeffers* because that judgment allowed convictions under both §§ 846 and 848 to stand. Those convictions, however, had been entered in separate trials and our review only addressed the conviction under § 848. The Court affirmed that conviction not because anyone on the Court suggested that Congress had intended to authorize dual convictions for the same offense,[13] but rather because the four-Justice plurality decided that Jeffers had waived any right to object to Jeffers' prosecution for that conviction, see *Jeffers*, 432 U. S., at 152–154, and because Justice White believed that the two prosecutions were for different offenses.

The sole ground for Justice White's critical fifth vote to affirm the judgment was his belief, set forth in a single short paragraph, that conspiracy was not a lesser included offense of CCE. *Id.*, at 158 (opinion concurring in judgment in part and dissenting in part). In Part II of this opinion we have rejected that view. Accordingly, even if we could infer that the plurality had silently reached the rather bizarre conclusion that Congress intended to allow dual convictions but to preclude other multiple punishments, only four Justices would have supported it, with four others explicitly disagreeing. As to this issue, then, the judgment amounts at best to nothing more than an unexplained affirmance by an equally divided court—a judgment not entitled to precedential weight no matter what reasoning may have supported it. See *Neil* v. *Biggers*, 409 U. S. 188, 192 (1972). The more important message conveyed by *Jeffers* is found not in the bare judgment, but in the plurality's conclusion, joined by the four dissenters, that CCE and conspiracy are insufficiently distinct to justify a finding that Congress intended to allow punishments for both when they rest on the same activity.[14]

---

[13] Indeed, the parties insisted that the case did not involve multiple punishment concerns, *Jeffers*, 432 U. S., at 154, and n. 23, and the Government did not contend that Congress intended to authorize the imposition of dual punishments. Because neither the Court nor the parties addressed the issue, *Jeffers* is a singularly unlikely source for a holding that Congress clearly authorized multiple convictions. Cf. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38 (1952).

---

[14] The Government suggests that convictions are authorized for both §§846 and 848 because they are different sections of the United States Code. Brief for United States 16. This does not rise to the level of the clear statement necessary for us to conclude that despite the identity of the statutory elements, Congress intended to allow multiple punishments. After all, we concluded in *Ball* that the statutes at issue did not authorize separate convictions, and they were even more distant in the Code. See 470 U. S., at 863–864 (discussing 18 U. S. C. §922(h) and 18 U. S. C. App. §1202(a) (1984)). If anything, the proximity of §§846 and 848 indicates that Congress understood them to be directed to similar, rather than separate, evils. Cf. *Albernaz* v. *United States*, 450 U. S. 333, 343 (1981).

The Government further discerns congressional intent to allow multiple punishment from "significant differences" between *Ball* and this case. Brief for United States 19–24. None of its arguments, however, demonstrates that Congress "specially authorized" convictions for both the greater and lesser included offenses we address today. *Whalen*, 445 U. S., at 693. The Government suggests, for example, that the statutes in *Ball* were directed at virtually identical activity, while CCE and conspiracy are not. As we have already concluded, however, every proof of a CCE will demonstrate a conspiracy based on the same facts. That overlap is enough to conclude, absent more, that Congress did not intend to allow punishments for both.

V

Finally, the Government argues that Congress must have intended to allow multiple convictions because doing so would provide a "backup" conviction, preventing a defendant who later successfully challenges his greater offense from escaping punishment altogether—even if the basis for the reversal does not affect his conviction under the lesser. Brief for United States 20–22. We find the argument unpersuasive, for there is no reason why this pair of greater and lesser offenses should present any novel problem beyond that posed by any other greater and lesser included offenses, for which the courts have already developed rules to avoid the perceived danger.

In *Tinder* v. *United States*, 345 U. S. 565, 570 (1953), the defendant had been convicted of theft from a mailbox and improperly sentenced to prison for more than one year even though the evidence only supported a misdemeanor conviction. Exercising our "power to do justice as the case requires" pursuant to 28 U. S. C. § 2106, we ordered the District Court to correct the sentence without vacating the underlying conviction. Relying on *Tinder* and the practice in "state courts, including courts governed by statutes virtually the same as Section 2106," the Court of Appeals for the District of Columbia Circuit later decided that its "power to modify erroneous judgments authorizes reduction to a lesser included offense where the evidence is insufficient to support an element of the [greater] offense stated in the verdict." *Austin* v. *United States*, 382 F. 2d 129, 140, 141–143 (1967).[15]

---

[15] The Court of Appeals used this same power in *Allison* v. *United States*, 409 F. 2d 445 (CADC 1969), but noted: "[T]he circumstances in which such authority may be exercised are limited. It must be clear (1) that the evidence adduced at trial fails to support one or more elements of the crime of which appellant was convicted, (2) that such evidence sufficiently sustains all the elements of another offense, (3) that the latter is a lesser included offense of the former, and (4) that no undue prejudice will result to the accused." *Id.*, at 450–451.

Consistent with the views expressed by the District of Columbia Circuit, federal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense. See 8A J. Moore, Federal Practice ¶ 31.03[5], and n. 54 (2d ed. 1995); *United States* v. *Ward*, 37 F. 3d 243, 251 (CA6 1994) (after finding insufficient evidence to support CCE count, Court of Appeals vacated CCE conviction and sentence and remanded for entry of conspiracy conviction, which District Court had previously vacated as lesser included offense of CCE), cert. denied, 514 U. S. 1030 (1995); *United States* v. *Silvers*, 888 F. Supp. 1289, 1306–1309 (ND Md. 1995) (reinstating conspiracy conviction previously vacated after granting motion for new trial on CCE conviction). This Court has noted the use of such a practice with approval. *Morris* v. *Mathews*, 475 U. S. 237, 246–247 (1986) (approving process of reducing erroneous greater offense to lesser included offense as long as the defendant is not able to demonstrate that "but for the improper inclusion of the [erroneous] charge, the result of the proceeding probably would have been different"). See also *Jones* v. *Thomas*, 491 U. S. 376, 384–385, n. 3 (1989) (citing *Morris*).

There is no need for us now to consider the precise limits on the appellate courts' power to substitute a conviction on a lesser offense for an erroneous conviction of a greater offense.[16] We need only note that the concern motivating the Government in asking us to endorse either the Seventh Circuit's practice of entering concurrent sentences on CCE and conspiracy counts, or the Second Circuit's practice of entering concurrent judgments, is no different from the problem that arises whenever a defendant is tried for greater and lesser offenses in the same proceeding. In such instances, neither legislatures nor courts have found it necessary to impose multiple convictions, and we see no reason why Congress, faced with the same problem, would consider it necessary to deviate from the traditional rule.[17]

---

[16] Indeed, because of our holding today, problems like the one presented in this case are unlikely to arise in the future. A jury is generally instructed not to return a verdict on a lesser included offense once it has found the defendant guilty of the greater offense. See, *e. g.*, Seventh Circuit Pattern Criminal Jury Instruction 2.03, in 1 L. Sand, J. Siffert, W. Loughlin, & S. Reiss, Modern Federal Jury Instructions, p. 7–7 (1991).

VI

A guilty verdict on a § 848 charge necessarily includes a finding that the defendant also participated in a conspiracy violative of § 846; conspiracy is therefore a lesser included offense of CCE. Because the Government's arguments have not persuaded us otherwise, we adhere to the presumption that Congress intended to authorize only one punishment. Accordingly, "[o]ne of [petitioner's] convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense" and must be vacated. *Ball*, 470 U. S., at 864.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

---

[17] In certain circumstances, it may be that the Government will investigate and prosecute an individual for one or more § 846 conspiracies without being aware of facts that would justify charging a defendant with a violation of § 848 as well. Moreover, a lesser included § 846 conspiracy may not always be coterminous with the larger CCE. Because neither instance is true here, we need not explore the consequences of our holding today for purposes of the successive prosecution strand of the Double Jeopardy Clause, see *Diaz* v. *United States*, 223 U. S. 442, 448–449 (1912); *Brown* v. *Ohio*, 432 U. S., at 169, n. 7; see also *Garrett*, 471 U. S., at 786–793, nor need we address how prior convictions for lesser included § 846 offenses should be handled for purposes of entering judgment if the later § 848 conviction is obtained but then set aside.

O'CONNOR *v.* CONSOLIDATED COIN CATERERS CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95–354. Argued February 27, 1996—Decided April 1, 1996

At age 56, petitioner was fired by respondent corporation and replaced by a 40-year-old worker. He then filed this suit, alleging that his discharge violated the Age Discrimination in Employment Act of 1967 (ADEA). The District Court granted respondent's summary judgment motion, and the Court of Appeals affirmed, holding that petitioner failed to make out a prima facie case of age discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, because he failed to show that he was replaced by someone outside the age group protected by the ADEA.

Held: Assuming that Title VII's *McDonnell Douglas* framework is applicable to ADEA cases, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination. Replacement by someone under 40 fails this requirement. Although the ADEA limits its protection to those who are 40 or older, it prohibits discrimination against those protected employees on the basis of age, not class membership. That one member of the protected class lost out to another member is irrelevant, so long as he lost out *because of his age.* The latter is more reliably indicated by the fact that his replacement was substantially younger than by the fact that his replacement was not a member of the protected class.

56 F. 3d 542, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

George Daly argued the cause for petitioner. With him on the briefs were *Paul Alan Levy* and *Alan B. Morrison.*

Paul R. Q. Wolfson argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Days, Assistant Attorney General Patrick, Deputy Solicitor General Bender, C. Gregory Stewart, Gwendolyn Young Reams, Lorraine C. Davis,* and *Barbara L. Sloan.*

James B. Spears, Jr., argued the cause for respondent. With him on the brief were *Jacob J. Modla* and *Robert S. Phifer*.*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a plaintiff alleging that he was discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. §621 *et seq.*, must show that he was replaced by someone outside the age group protected by the ADEA to make out a prima facie case under the framework established by *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973).

Petitioner James O'Connor was employed by respondent Consolidated Coin Caterers Corporation from 1978 until August 10, 1990, when, at age 56, he was fired. Claiming that he had been dismissed because of his age in violation of the ADEA, petitioner brought suit in the United States District Court for the Western District of North Carolina. After discovery, the District Court granted respondent's motion for summary judgment, 829 F. Supp. 155 (1993), and petitioner appealed. The Court of Appeals for the Fourth Circuit stated that petitioner could establish a prima facie case under *McDonnell Douglas* only if he could prove that (1) he was in the age group protected by the ADEA; (2) he was discharged or demoted; (3) at the time of his discharge or demotion, he was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge or demotion, he was replaced by someone of comparable qualifications outside the protected class. Since petitioner's replacement was 40 years old, the Court of Appeals concluded that the last element of the prima facie case had not been made out.[1] 56 F. 3d 542, 546 (1995). Finding that petitioner's claim could not survive a motion for summary judgment without benefit of the *McDonnell Douglas* presumption (*i. e.*, "under the ordinary standards of proof used in civil cases," 56 F. 3d, at 548), the Court of Appeals affirmed the judgment of dismissal. We granted O'Connor's petition for certiorari. 516 U. S. 973 (1995).

**Steven S. Zaleznick* and *Cathy Ventrell-Monsees* filed a brief for the American Association of Retired Persons et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Tarra DeShields-Minnis* and *Andrew H. Baida*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Winston Bryant* of Arkansas, *M. Jane Brady* of Delaware, *Frank J. Kelley* of Michigan, *Frankie Sue Del Papa* of Nevada, *Deborah T. Poritz* of New Jersey, *Mark Barnett* of South Dakota, and *W. A. Drew Edmondson* of Oklahoma; for the Chamber of Commerce of the United States by *Marshall B. Babson*, *Stanley R. Strauss*, *Sue J. Henry*, *Stephen A. Bokat*, *Robin S. Conrad*, and *Mona C. Zeiberg;* for the Equal Employment Advisory Council by *Douglas S. McDowell;* and for the New England Legal Foundation by *Steven S. Ostrach* and *Cynthia L. Amara*.

Jack L. Whitacre filed a brief for the National Retail Federation as *amicus curiae*.

In *McDonnell Douglas*, we "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases." *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 506 (1993). We held that a plaintiff alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, could establish a prima facie case by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the] complainant's qualifications." *McDonnell Douglas*,

---

[1] The court also concluded that even under a modified version of the *McDonnell Douglas* prima facie standard which the Fourth Circuit applies to reduction-in-force cases, see *Mitchell* v. *Data General Corp.*, 12 F. 3d 1310, 1315 (1993), petitioner could not prevail. We limit our review to the Fourth Circuit's treatment of this case as a non-reduction-in-force case.

411 U. S., at 802. Once the plaintiff has met this initial burden, the burden of production shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Ibid.* If the trier of fact finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, the court must enter judgment for the plaintiff. *St. Mary's Honor Center, supra,* at 509–510, and n. 3; *Texas Dept. of Community Affairs* v. *Burdine,* 450 U. S. 248, 254 (1981).

In assessing claims of age discrimination brought under the ADEA, the Fourth Circuit, like others,[2] has applied some variant of the basic evidentiary framework set forth in *McDonnell Douglas.* We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it. Cf. *St. Mary's Honor Center, supra,* at 506, n. 1 (assuming that "the *McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U. S. C. § 1983"). On that assumption, the question presented for our determination is what elements must be shown in an ADEA case to establish the prima facie case that triggers the employer's burden of production.

As the very name "prima facie case" suggests, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a "legally mandatory, rebuttable presumption," *Burdine, supra,* at 254, n. 7. The element of replacement by someone under 40 fails this requirement. The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," 29 U. S. C. § 623(a)(1), though the prohibition is "limited to individuals who are at least 40 years of age," § 631(a). This language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age.* Or to put the point more concretely, there can be no greater inference of *age* discrimination (as opposed to "40 or over" discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old. Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case.

---

[2] See, *e. g., Roper* v. *Peabody Coal Co.,* 47 F. 3d 925, 926–927 (CA7 1995); *Rinehart* v. *Independence,* 35 F. 3d 1263, 1265 (CA8 1994), cert. denied, 514 U. S. 1096 (1995); *Seman* v. *Coplay Cement Co.,* 26 F. 3d 428, 432, n. 7 (CA3 1994); *Roush* v. *KFC Nat. Mgt. Co.,* 10 F. 3d 392, 396 (CA6 1993), cert. denied, 513 U. S. 808 (1994); *Lindsey* v. *Prive Corp.,* 987 F. 2d 324, 326, n. 5 (CA5 1993); *Goldstein* v. *Manhattan Industries, Inc.,* 758 F. 2d 1435, 1442 (CA11), cert. denied, 474 U. S. 1005 (1985); *Haskell* v. *Kaman Corp.,* 743 F. 2d 113, 119, and n. 1 (CA2 1984); *Cuddy* v. *Carmen,* 694 F. 2d 853, 856–857 (CADC 1982); *Douglas* v. *Anderson,* 656 F. 2d 528, 531–532 (CA9 1981); *Loeb* v. *Textron, Inc.,* 600 F. 2d 1003, 1014–1016 (CA1 1979); *Schwager* v. *Sun Oil Co. of Pa.,* 591 F. 2d 58, 60–61 (CA10 1979).

Perhaps some courts have been induced to adopt the principle urged by respondent in order to avoid creating a prima facie case on the basis of very thin evidence—for example, the replacement of a 68-year-old by a 65-year-old. While the respondent's principle theoretically permits such thin evidence (consider the example above of a 40-year-old replaced by a 39-year-old), as a practical matter it will rarely do so, since the vast majority of age-discrimination claims come from older employees. In our view, however, the proper solution to the problem lies not in making an utterly irrelevant factor an element of the prima facie case, but rather in recognizing that the prima facie case requires "*evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . .*" *Teamsters* v. *United States,* 431 U. S. 324, 358 (1977) (emphasis added). In the age-discrimination context, such an inference cannot be drawn from the replacement of one worker with another worker insignificantly younger. Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.

The judgment of the Fourth Circuit is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

LONCHAR *v.* THOMAS, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95–5015. Argued December 4, 1995—Decided April 1, 1996

Petitioner Lonchar was sentenced to death for murder nine years ago. In the years following the affirmance of his conviction and sentence, his sister and brother each filed "next friend" state habeas petitions, which Lonchar opposed, and Lonchar filed, and then had dismissed, a state habeas petition. Shortly before his scheduled execution, he filed another state habeas petition. When it was denied, he filed this "eleventh hour" federal petition, his first. Reasoning that federal Habeas Corpus Rule 9, not some generalized equitable authority to dismiss, governed the case, the District Court held that Lonchar's conduct in waiting almost six years to file his federal petition did not constitute an independent basis for rejecting the petition and granted a stay to permit time for consideration of other grounds for dismissal raised by the State. The Court of Appeals vacated the stay. It held that equitable doctrines independent of Rule 9 applied, relying chiefly on this Court's *per curiam* order in *Gomez* v. *United States Dist. Court for Northern Dist of Cal.*, 503 U. S. 653. Setting aside the Rules and traditional habeas doctrines, the court concluded that Lonchar did not merit equitable relief.

Held:

1. The principle of *Barefoot* v. *Estelle*, 463 U. S. 880, applies when a district court is faced with a request for a stay in a first federal habeas case: If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot. If the court lacks authority to directly dispose of the petition on the merits, it would abuse its discretion by attempting to achieve the same result indirectly by denying a stay. Since Lonchar's claims certainly seem substantial enough to prevent dismissal under Habeas Corpus Rule 4 and the State does not argue to the contrary, the courts below correctly assumed that he could not be denied a stay unless his petition was properly subject to dismissal. This Court's *Gomez* order has not displaced *Barefoot*'s rationale with one permitting denial of a stay in first federal habeas cases, even when the district court lacks authority to dismiss the petition on the merits. *Gomez* did not involve a denial of a stay in a case in which the lower court had no authority to dismiss the petition or a

first habeas petition, and it neither discussed nor cited *Barefoot,* much less repudiated its rationale. Pp. 319–321.

2. The Court of Appeals erred in dismissing Lonchar's first federal petition for special ad hoc "equitable" reasons not encompassed within the relevant statutes, the Federal Habeas Corpus Rules, or prior precedents. First, the history of the Great Writ reveals, not individual judges dismissing writs for ad hoc reasons, but, rather, the gradual evolution of more formal judicial, statutory, or rules-based doctrines of law that regularize and thereby narrow the discretion that individual judges can freely exercise. See, *e. g., McCleskey* v. *Zant,* 499 U. S. 467, 479–489. Second, the fact that the writ has been called an "equitable" remedy, see, *e. g., Gomez, supra,* at 653–654, does not authorize a court to ignore this body of statutes, rules, and precedents. Rather, "courts of equity must be governed by rules and precedents no less than the courts of law," *Missouri* v. *Jenkins,* 515 U. S. 70, 127 (THOMAS, J., concurring). The arguments against ad hoc departure from settled rules seem particularly strong when dismissal of a *first* habeas petition is at issue, since such dismissal denies the petitioner the protections of the Great Writ entirely. See *Ex parte Yerger,* 8 Wall. 85, 95. Third, Rule 9(a)—which permits courts to dismiss a habeas petition when "it appears that the state . . . has been prejudiced in its ability to respond . . . by delay in [the petition's] filing"—specifically and directly addresses the delay factor that led the Court of Appeals to dismiss Lonchar's petition. The District Court was not asked to, and did not, make a finding of prejudice in this case, whereas the Rule's history makes plain that the prejudice requirement represents a critical element in the balancing of interests undertaken by Congress and the Rule's framers, which courts may not undermine through the exercise of background equitable powers. See *Bank of Nova Scotia* v. *United States,* 487 U. S. 250, 255. Fourth, contrary to the Court of Appeals' view, *Gomez, supra,* at 653–654, did not authorize ad hoc equitable departures from the Habeas Corpus Rules and did not purport to work a significant change in the law applicable to the dismissal of first habeas petitions. Fifth, the fact that Lonchar filed his petition at the "eleventh hour" does not lead to a different conclusion. *Gomez, supra,* at 654, and, *e. g., Sawyer* v. *Whitley,* 505 U. S. 333, 341, n. 7, distinguished. The complexity inherent in developing fair and effective rules to minimize the harms created by last-minute petitions in capital cases offers a practical caution against a judicial attempt, outside the framework of the Habeas Rules, to fashion reforms concerning first federal habeas petitions. Sixth, a different result is not warranted by the special circumstances in this case, including the "next friend" petitions filed by Lonchar's siblings, his filing and later withdrawal of his own *state* habeas petition, and the fact that his motive for

filing this federal habeas petition was in part to delay his execution. The Court expresses no view about the proper outcome of the Rules' application in this case. Pp. 322–332.

58 F. 3d 590, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which SCALIA, KENNEDY, and THOMAS, JJ., joined, *post*, p. 334.

Donald B. Verrilli, Jr., argued the cause for petitioner. With him on the briefs were *Paul M. Smith* and *Clive A. Stafford Smith.*

Mary Beth Westmoreland, Senior Assistant Attorney General of Georgia, argued the cause for respondent. With her on the brief were *Michael J. Bowers*, Attorney General, and *Susan V. Boleyn*, Senior Assistant Attorney General.

JUSTICE BREYER delivered the opinion of the Court.

This case asks us to decide whether a federal court may dismiss a first federal habeas petition for general "equitable" reasons beyond those embodied in the relevant statutes, Federal Habeas Corpus Rules, and prior precedents. We decide that the Court of Appeals erred in doing so in this case. The primary "equitable" consideration favoring dismissal of the "eleventh hour" petition before us is serious delay. A Federal Habeas Corpus Rule deals specifically with delay. See 28 U. S. C. § 2254 Rule 9(a) (permitting courts to dismiss a habeas petition when "it appears that the state . . . has been prejudiced in its ability to respond . . . by delay in its filing"). And, in our view, this Rule, not some general "equitable" power to create exceptions to the Rule, should have determined whether or not the petition's dismissal was appropriate.

I

Petitioner Larry Lonchar was sentenced to death for murder nine years ago. He filed this "eleventh hour" petition for habeas corpus—his *first* federal habeas corpus petition—on June 28, 1995, the day of his scheduled execution. To understand the procedural significance of this petition, the nature of the delay here at issue, and other relevant special features of this case, we must consider the petition in the context of earlier proceedings, which, for ease of exposition, we divide into five stages:

Stage One: Trial, Appeal, Execution Date: 1987–1990. In 1987, Lonchar was convicted in state court for murdering three people and sentenced to death by electrocution. A mandatory state-court appeal led to affirmance of the conviction and sentence in 1988. The trial judge then issued a death warrant for the week of March 23, 1990. Throughout these proceedings Lonchar said he wanted to die and refused to cooperate with his lawyer or to attend his trial. He also attempted (unsuccessfully) to waive his mandatory appeal, declined to authorize any collateral attacks on his conviction or sentence, and wrote the trial judge asking for an execution date.

Stage Two: Sister's "Next Friend" Habeas: March 1990–February 1993. Two days before the scheduled execution, Lonchar's sister, Chris Kellog, filed a "next friend" habeas petition in state court, claiming Lonchar was incompetent. Lonchar opposed the action and eventually the state and federal courts, at trial and appellate levels, held that Lonchar was competent and dismissed the petition. The state courts again issued a death warrant, this time for the week of February 24, 1993.

Stage Three: Lonchar's own State Habeas: February 1993–May 1995. After Lonchar's lawyer told him that his brother, Milan, was threatening to kill himself because of Lonchar's execution, Lonchar authorized a habeas petition in state court and obtained a stay of execution. He subsequently changed his mind and told the judge he did not want to proceed. Although his lawyers objected that Lonchar was incompetent to make this decision, the judge dismissed the petition without prejudice. A death warrant was issued for the week of June 23, 1995.

Stage Four: Brother's "Next Friend" Habeas: June 20–June 23, 1995. Three days before the scheduled execution, Lonchar's brother, Milan, filed another "next friend" habeas petition in state court. Lonchar again opposed it. Within three days, Milan's petition met the same fate as his sister's earlier petition. That is to say, federal and state courts, at trial and appellate levels, all found Lonchar competent and denied the petition.

Stage Five: Lonchar's Current Habeas: June 23, 1995–Present. Immediately thereafter, after discussions with his lawyers, Lonchar filed another state habeas petition containing 22 claims, including one that challenged the method of execution. He told the state-court judge that he wished to pursue each of the 22 claims, but was litigating them only to delay his execution, with the hope that the State would change the execution method to lethal injection so he could donate his organs. The state courts stayed the execution briefly, and then, two days later, denied the petition. Lonchar immediately filed his first federal habeas petition, which set forth the same 22 claims.

The State asked that Lonchar's federal petition be dismissed, stressing what it called Lonchar's "inequitable conduct" in waiting almost six years, and until the last minute, to file a federal habeas petition. The District Court held that this could not constitute an independent basis for rejecting the petition. In its view, Habeas Corpus Rule 9, not some generalized equitable authority to dismiss, governed the case. And, it held, Rule 9's authority to dismiss for "abuse of the writ" applied to "second or successive" habeas petitions, not to a first petition, such as Lonchar's. See Habeas Corpus Rule 9(b) ("A *second or successive* petition may be dismissed if . . . the judge finds that the failure of the petitioner to assert those grounds *in a prior petition* constituted an abuse of the writ") (emphasis added). The District

Court therefore granted a stay to permit time for consideration of the State's other grounds in its motion to dismiss.

The next day the Court of Appeals for the Eleventh Circuit vacated the stay. 58 F. 3d 590 (1995). It pointed out that the District Court had "based its holding exclusively on Rule 9." *Id.*, at 592. It held that "equitable doctrines independent of Rule 9" applied, relying chiefly on this Court's *per curiam* order in *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653 (1992). 58 F. 3d, at 593. And, setting aside the Rules and traditional habeas doctrines, the court concluded that, in the circumstances of this case, "Lonchar does not merit equitable relief." *Ibid.*

As mentioned above, we granted certiorari in order to consider whether a federal court may, in such circumstances, dismiss a valid first habeas petition for "equitable reasons" other than reasons listed in federal statutes and Rules, or well established in this Court's precedents.

II

We first discuss a preliminary matter. We have before us a Court of Appeals order that vacates a stay, not an order to dismiss the habeas petition. We believe, however, that this fact makes no difference. That is, the Court of Appeals order vacating the stay is lawful *only if* dismissal of the petition would have been lawful. By bringing about Lonchar's execution, vacating the stay would prevent the courts from considering the petition's merits, just as would its dismissal.

This Court has previously considered, in a slightly different context, whether a court may allow a first federal habeas petition to be mooted by an execution, even though the court lacked the authority to dispose of the petition on the merits. In *Barefoot* v. *Estelle*, 463 U. S. 880 (1983), the Court considered the proper standard for granting or denying a stay pending consideration of an appeal from a dismissal of a first federal habeas petition. The Court stated:

> "When a certificate of probable cause is issued by the district court, as it was in this case, or later by the court of appeals, petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal. Accordingly, a court of appeals, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause on his initial habeas appeal." *Id.*, at 893–894.

We believe that the same principle applies when a district court is faced with a request for a stay in a first federal habeas case: If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot. That is, if the district court lacks authority to directly dispose of the petition on the merits, it would abuse its discretion by attempting to achieve the same result indirectly by denying a stay. Of course, a district court is authorized to dismiss a petition summarily when "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court," Habeas Corpus Rule 4, just as a court of appeals is not required to address an appeal that fails to meet the certificate of probable cause standard of a "substantial showing of the denial of a federal right," see *Barefoot,* 463 U. S., at 893–894. And, as is also true of consideration of appeals, a district court may, within the constraints of due process, expedite proceedings on the merits. *Id.*, at 894–895.

In this case, Lonchar's claims certainly seem substantial enough to prevent dismissal under Rule 4, and the State does not argue to the contrary. That being so, we believe that the District Court and Court of Appeals were correct to assume that Lonchar could not be denied a stay unless his petition was properly subject to dismissal. See App. 62, 63–64; 58 F. 3d, at 593.

The concurrence argues that the Court's decision in *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, *supra*, displaced the rationale of *Barefoot*, relying particularly on the statement that a "court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." 503 U. S., at 654. The concurrence understands this statement to authorize denial of a stay, for generalized equitable reasons, in first federal habeas cases, even when the district court lacks authority to dismiss the petition on the merits. We do not believe this sentence, or the rest of the Court's order in *Gomez*, supports this conclusion.

First, *Gomez* did not involve denial of a stay in a case in which the lower court had no authority to dismiss the petition. Instead, as the concurrence concedes, *post*, at 338, the case could have been dismissed as an "abuse of the writ." See 503 U. S., at 653–654. Second, *Gomez* involved a *fifth* attempt to secure collateral review, not a *first* habeas petition. *Barefoot* indicated that stays in "[s]econd and successive federal habeas corpus petitions present a different issue," since in such cases it is more likely that "'a condemned inmate might attempt to use repeated petitions and appeals as a mere delaying tactic,'" and because this danger is specially recognized and addressed in the Habeas Corpus Rules. *Barefoot*, *supra*, at 895. Finally, the concurrence's reading of *Gomez* seriously conflicts with *Barefoot*'s well-settled treatment of first habeas petitions. We decline to adopt such a far-reaching interpretation of this *per curiam* order, especially since *Gomez* did not concern a first habeas petition, and since the *Gomez* order did not discuss (or even cite) *Barefoot*, much less explicitly repudiate its rationale.

III

We turn, then, to the main question: Could the Court of Appeals properly dismiss this first habeas petition for special ad hoc "equitable" reasons not encompassed within the framework of Rule 9? We conclude that it could not.

First, the history of the Great Writ of Habeas Corpus reveals, not individual judges dismissing writs for ad hoc reasons, but, rather, the gradual evolution of more formal judicial, statutory, or rules-based doctrines of law. See, *e. g., McCleskey* v. *Zant,* 499 U. S. 467, 479–489 (1991); *Barefoot, supra,* at 892; *Kuhlmann* v. *Wilson,* 477 U. S. 436, 451 (1986) (plurality opinion); *Sanders* v. *United States,* 373 U. S. 1, 15 (1963); *Townsend* v. *Sain,* 372 U. S. 293, 313 (1963). In earlier times, the courts followed comparatively simple rules, even occasionally disregarding complex procedural doctrines, such as res judicata, see *McCleskey, supra,* at 479, as they exercised the writ in light of its most basic purpose, avoiding serious abuses of power by a government, say a king's imprisonment of an individual without referring the matter to a court. See, *e. g.,* L. Yackle, Postconviction Remedies § 4, pp. 9–11 (1981); W. Duker, A Constitutional History of Habeas Corpus 4–6 (1980); W. Church, A Treatise on the Writ of Habeas Corpus §§ 1–46, pp. 2–40 (2d ed. 1893). As the writ has evolved into an instrument that now demands not only conviction by a court of competent jurisdiction, see *In re Coy,* 127 U. S. 731, 756–758 (1888), but also application of basic constitutional doctrines of fairness, see *Jones* v. *Cunningham,* 371 U. S. 236, 243 (1963), Congress, the Rule writers, and the courts have developed more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise. Those principles seek to maintain the courts' freedom to issue the writ, aptly described as the "highest safeguard of liberty," *Smith* v. *Bennett,* 365 U. S. 708, 712 (1961), while at the same time avoiding serious, improper delay, expense, complexity, and interference with a State's interest in the "finality" of its own legal processes. *Withrow* v. *Williams,* 507 U. S. 680, 698 (1993) (O'CONNOR, J., concurring in part and dissenting in part); *McCleskey, supra,* at 490–492; *Reed* v. *Ross,* 468 U. S. 1, 10 (1984). These legal principles are embodied in statutes, rules, precedents, and practices that control the writ's exercise. Within constitutional constraints they reflect a balancing of objectives (sometimes controversial), which is normally for Congress to make, but which courts will make when Congress has not resolved the question. See *Brecht* v. *Abrahamson,* 507 U. S. 619, 632–633 (1993).

Second, the fact that the writ has been called an "equitable" remedy, see, *e. g., Gomez, supra,* at 653–654, does not authorize a court to ignore this body of statutes, rules, and precedents. "There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges." *Opinion on the Writ of Habeas Corpus,* Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758) (Wilmot, J.). Rather, "courts of equity must be governed by rules and precedents no less than the courts of law." *Missouri* v. *Jenkins,* 515 U. S. 70, 127 (1995) (THOMAS, J., concurring). See also *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 417 (1975); The Federalist No. 78, p. 528 (J. Cooke ed. 1961). As Selden pointed out so many years ago, the alternative is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot. See 1 J. Story, Commentaries on Equity Jurisprudence 16 (13th ed. 1886).

That is why this Court, in *McCleskey,* said that concern about habeas petition abuses has led to "a complex and evolving body of equitable *principles* informed and controlled by historical usage, statutory developments, and judicial decisions." 499 U. S., at 489 (emphasis added). And it is why this Court, in *McCleskey,* also reaffirmed the importance, " 'in order to preclude individualized enforcement of the Constitution in different parts of the Nation,' " of " 'lay[ing] down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts.'" *Id.*, at 496 (quoting *Brown* v. *Allen*, 344 U. S. 443, 501–502 (1953) (opinion of Frankfurter, J.)).

After all, equitable rules that guide lower courts reduce uncertainty, avoid unfair surprise, minimize disparate treatment of similar cases, and thereby help all litigants, including the State, whose interests in "finality" such rules often further. See *Barefoot*, 463 U. S., at 892; *Kuhlmann, supra*, at 451; *Townsend, supra*, at 313. See also *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991) (barring consideration of claims procedurally defaulted in state court absent cause and prejudice or a fundamental miscarriage of justice); *Teague* v. *Lane*, 489 U. S. 288, 299–316 (1989) (plurality opinion) (barring from habeas proceedings federal claims based on certain "new rules" of constitutional law); *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982) ("[A] district court must dismiss habeas petitions containing both unexhausted and exhausted claims").

And the arguments against ad hoc departure from settled rules would seem particularly strong when dismissal of a *first* habeas petition is at issue. Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty. See *Ex parte Yerger*, 8 Wall. 85, 95 (1869) (the writ "has been for centuries esteemed the best and only sufficient defence of personal freedom"); *Withrow, supra*, at 700 (O'CONNOR, J., concurring in part and dissenting in part) (decisions involving limitation of habeas relief "warrant restraint"). Even in the context of "second and successive" petitions—which pose a greater threat to the State's interests in "finality" and are less likely to lead to the discovery of unconstitutional punishments—this Court has created careful rules for dismissal of petitions for abuse of the writ. See *McCleskey, supra*.

This is not to say that a district court has no discretion in dealing with first federal habeas petitions. The Habeas Corpus Rules themselves provide district courts with ample discretionary authority to tailor the proceedings to dispose quickly, efficiently, and fairly of first habeas petitions that lack substantial merit, while preserving more extensive proceedings for those petitions raising serious questions. For instance, as noted above, the Rules permit a district court to dismiss summarily a first petition without waiting for the State's response if "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief." Habeas Corpus Rule 4. Moreover, even if the petition cannot be dismissed under that standard, the district court is still authorized to "take such other action as the judge deems appropriate." *Ibid.* The Advisory Committee's Note makes clear that this provision was

> "designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss based upon information furnished by respondent, which may show that petitioner's claims have already been decided on the merits in a federal court; that petitioner has failed to exhaust state remedies; that the petitioner is not in custody within the meaning of 28 U. S. C. § 2254; or that a decision in the matter is pending in state court. In these situations, a dismissal may be called for on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition. In other situations, the judge may want to consider a motion from respondent to make the petition more certain. Or the judge may want to dismiss some allegations in the petition, requiring the respondent to answer only those claims which appear to have some arguable merit." 28 U. S. C., p. 478.

The Rules also afford the district court substantial discretion in the conduct of a case once an answer has been ordered. It may decide to order expansion of the record to facilitate a disposition on the merits without the need for an evidentiary hearing. Habeas Corpus Rule 7. Discovery is available only if "the judge in the exercise of his discretion and for good cause shown grants leave." Habeas Corpus Rule 6(a). And the district court is afforded a degree of discretion in determining whether to hold an evidentiary hearing. See Habeas Corpus Rule 8(a); *Townsend,* 372 U. S., at 318; *Keeney* v. *Tamayo-Reyes,* 504 U. S. 1, 11–12 (1992). Thus, the district court is afforded substantial discretion to expedite proceedings, cf. *Barefoot, supra,* at 894–895, in order quickly to dispose of meritless first petitions while at the same time preserving the important right of those raising serious habeas questions to have their claims thoroughly considered by the district court.

Third, a specific federal Habeas Corpus Rule, Rule 9(a), directly addresses the primary factor—delay—that led the Court of Appeals to dismiss the petition for "equitable reasons." That Rule says:

> "Delayed petitions. A petition may be dismissed *if* it appears that the state of which the respondent is an officer *has been prejudiced* in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred." (Emphasis added.)

The Rule applies because Lonchar's petition is a "delayed petition." And the language of the Rule requires, as a condition of dismissal, a finding of "prejudice," which the District Court was not asked to, and did not, make. (Because the State specifically disavows reliance upon Rule 9(a), we do not consider what would constitute sufficient "prejudice" to justify application of the Rule in the context of a last-minute habeas petition.) Instead, it asked the Court of Appeals to develop an equitable rule under which a "petition may be dismissed" for "delay in its filing" *without* the prejudice precondition.

But the history of the Rule makes plain that the prejudice requirement represents a critical element in the balancing of interests undertaken by Congress and the framers of the Rule which courts may not undermine through the exercise of background equitable powers. See *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 255 (1988) ("The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked 'because a court has elected to analyze the question under the supervisory power'" (quoting *United States* v. *Payner*, 447 U. S. 727, 736 (1980)). The Advisory Committee's Note indicates that the very maxim upon which the Court of Appeals relied as authority for acting outside the Rules—the equitable maxim that "the petitioner's conduct may . . . disentitle him to relief," 58 F. 3d, at 592—was taken into account when the Rule's framers drafted Rule 9(a) and included its prejudice requirement. See Advisory Committee's Note on Habeas Corpus Rule 9, 28 U. S. C., p. 484. Moreover, Congress, when considering a draft of the Rule, see 28 U. S. C. § 2074, directly focused upon the prejudice requirement and *rejected*, by removing from the draft Rule, a provision that would have eased the burden of the prejudice requirement by presuming prejudice after a delay of five years. Compare Rules of Procedure: Communication from the Chief Justice of the United States Transmitting Rules and Forms Governing Proceedings Under Sections 2254 and 2255 of Title 28, H. R. Doc. No. 94–464, pp. 38–39 (1976), with Act of Sept. 28, 1976, Pub. L. 94–426, § 2(9), 90 Stat. 1335. See also H. R. Rep. No. 94–1471, p. 5 (1976) ("[I]t is unsound policy to require the defendant to overcome a presumption of prejudice"). Cf. *McCarthy* v. *Madigan*, 503 U. S. 140, 144 (1992)

(Even in an area, such as exhaustion, where judges have considerable discretionary authority, "appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme").

We recognize there is considerable debate about whether the present Rule properly balances the relevant competing interests. See, *e. g.*, U. S. Judicial Conference, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 6, 18–21 (1989) (hereinafter Powell Report) (suggesting a statute of limitations for habeas petitions); American Bar Association, Toward a More Just and Effective System of Review in State Death Penalty Cases 29–30 (1990) (hereinafter ABA Report) (same). But, to debate the present Rule's effectiveness is to affirm, not to deny, its applicability. Moreover, that debate's focus upon Congress also reveals the institutional inappropriateness of amending the Rule, in effect, through an ad hoc judicial exception, rather than through congressional legislation or through the formal rulemaking process. See *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986) ("[D]espite many attempts in recent years, Congress has yet to create a statute of limitations for federal habeas corpus actions. We should not lightly create a new judicial rule . . . to achieve the same end") (citation omitted); Appendix to this opinion (listing more than 80 bills that have proposed a statute of limitations for federal habeas cases since *Vasquez*, none of which has been adopted).

Fourth, contrary to the Court of Appeals' view, we do not believe that this Court, in *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653 (1992), authorized ad hoc equitable departures from the Habeas Corpus Rules. The Court of Appeals relied heavily on the statement:

> "Even if we were to assume, however, that Harris could avoid the application of *McCleskey* to bar his claim, we would not consider it on the merits. Whether his claim is framed as a habeas petition or as a [42 U. S. C.] § 1983 action, Harris seeks an equitable remedy." *Id.*, at 653–654.

But, this statement, understood in context, does not mean that this Court authorized setting aside the Habeas Corpus Rules and refusing to consider a first habeas petition for generalized "equitable" reasons. As we explained above, *Gomez* was *not* a first habeas petition. Harris, after bringing four habeas petitions, argued that he still could raise a "method of execution" claim in a last-minute § 1983 action, to which habeas rules, like *McCleskey*'s abuse of the writ doctrine, would not apply. The quoted sentence simply says that these rules *would* apply, even if § 1983 were also a proper vehicle for his "method of execution" claim, since Harris was still seeking equitable relief and the equitable rationale underlying *McCleskey*'s abuse of the writ doctrine—avoiding, among other things, "last-minute attempts to manipulate the judicial process," 503 U. S., at 654; *McCleskey*, 499 U. S., at 484–485, 491–493—would apply to a suit challenging the method of execution, regardless of the technical form of action. *Gomez* did not, and did not purport to, work a significant change in the law applicable to the dismissal of first habeas petitions.

Fifth, the fact that Lonchar filed his petition at the "eleventh hour" does not lead to a different conclusion. We recognize that the Court in *Gomez* said that "[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." 503 U. S., at 654. And this Court has made similar statements in other cases. See, *e. g.*, *Sawyer* v. *Whitley*, 505 U. S. 333, 341, n. 7 (1992) (judge may resolve doubts against petitioners who "delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution"); *Herrera* v. *Collins,* 506 U. S. 390, 425–426 (1993) (O'CONNOR, J., concurring).

These statements do not help the State, however, for they all involve "second or successive" habeas petitions. The Rules specifically authorize dismissal of *those* petitions for "abuse of the writ." Habeas Corpus Rule 9(b). See also 28 U. S. C. § 2244(b) (authorizing dismissal when "the applicant has . . . deliberately withheld the newly asserted ground *or otherwise abused the writ*") (emphasis added). *McCleskey* gives content to the notion of "abuse of the writ," as do the cases just mentioned. These statements, therefore, reflect an effort to follow and to apply the Habeas Corpus Rules, not an effort to develop law outside the Rules.

Indeed, to try to devise some sensible way of supplementing *first* federal habeas petition rules with ad hoc equitable devices would prove difficult. As we discussed, *supra,* at 324, the interest in permitting federal habeas review of a first petition is quite strong. And, given the importance of a first federal habeas petition, it is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair. As two prominent bodies charged with developing proposals for habeas law reform have pointed out, developing fair and effective rules to minimize the harms created by last-minute petitions in capital cases is quite complicated, requiring consideration of issues such as the State's control over setting execution dates, the time needed to exhaust state remedies, the common practice of substituting specialized capital counsel for habeas, and the time needed by habeas counsel to investigate claims, some of which (such as ineffective assistance of counsel) often cannot be raised on direct appeal. See ABA Report 26–29, 114–134; *id.,* at 29 ("In a system of review that employs artificial execution dates as a catalyst, there are *many* eleventh hours and *many* last minutes, because, if the petitioner does not seek a stay of execution at virtually every level, the execution is imminent"); Powell Report 1 ("[P]risoners often cannot obtain qualified counsel until execution is imminent"). These bodies, consequently, have proposed a comprehensive set of interrelated changes, see ABA Report 5–39; Powell Report 5–7, as have recent legislative proposals. See, *e. g.*, H. R. 3, 104th Cong., 1st Sess. (1995); H. R. 729, 104th Cong., 1st Sess. (1995); H. R. 2703, 104th Cong., 1st Sess. (1995); S. 3, 104th Cong., 1st Sess. (1995); S. 623, 104th Cong., 1st Sess. (1995); S. 735, 104th Cong., 1st Sess. (1995). This complexity offers a practical caution against a judicial attempt, outside the framework of the Habeas Corpus Rules, to fashion similar reforms concerning first federal habeas petitions.

Sixth, the special circumstances in this case—other than delay—do not warrant a different result. The earlier habeas petitions brought by Lonchar's sister and brother are beside the point. Lonchar did not assert his claims in those proceedings, nor did he conspire with his siblings to delay his execution. To the contrary, he opposed their petitions and prevailed in his opposition. See App. 22, 35, 48. These "next friend" petitions neither aggravate nor mitigate Lonchar's delay in filing his own petition during those six years.

Lonchar's filing and later withdrawal of his own *state* habeas petition would seem similarly beside the point. At most, the assertion and withdrawal of that petition would create a potential ground for a state-law procedural bar to a second state petition, which, in certain circumstances, might also prevent litigation of similar claims in federal court. See *Coleman*, 501 U. S., at 729–732. The State (despite its apparent agreement to Lonchar's withdrawal of the state petition "without prejudice," see App. 34, 161–163) has asserted just such a bar. It is free to litigate the matter on remand.

Nor do we believe that Lonchar's motive for filing this federal habeas petition can make a critical difference. Lonchar did say that he filed this petition to delay his execution with the hope that the State would change its execution method. But Lonchar's petition also requested the traditional habeas relief of a new trial or resentencing, App. 362, and he told the District Court specifically that he had considered each and every claim and wanted the court to hear them. Normally courts will not look behind an action that states a valid legal claim on its face in order to try to determine the comparative weight a litigant places on various subjective reasons for bringing the claim. A valid antitrust complaint or environmental action, for example, does not suddenly become invalid simply because the litigant is subjectively indifferent about receiving the requested equitable relief, but instead primarily wants to please his or her family or obtain revenge. More importantly, litigation about a petitioner's subjective motivations risks adding to the complexity of habeas litigation, asking a subjective question (about the petitioner's *true* motives) that is often unanswerable and the very asking of which may encourage and reward the disingenuous. See *Murray* v. *Carrier*, 477 U. S. 478, 487 (1986) (rejecting a subjective test for determining "cause" for procedural default, in part because under such a rule "federal habeas courts would routinely be required to hold evidentiary hearings to determine what prompted counsel's failure to raise the claim in question").

In sum, we believe that this case should have been examined within the framework of the Habeas Corpus Rules and settled precedents, not according to generalized equitable considerations *outside* that framework. We, of course, express no view about the proper outcome of the application of the Rules.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

In the last 10 years, bills proposing a statute of limitations for federal habeas corpus petitions have been introduced every year in Congress, more than 80 bills in all. See S. 2301, 99th Cong., 2d Sess. (1986); S. 2850, 99th Cong., 2d Sess. (1986); H. R. 72, 100th Cong., 1st Sess. (1987); H. R. 73, 100th Cong., 1st Sess. (1987); H. R. 1333, 100th Cong., 1st Sess. (1987); H. R. 3777, 100th Cong., 1st Sess. (1987); S. 260, 100th Cong., 1st Sess. (1987); S. 1285, 100th Cong., 1st Sess. (1987); S. 1970, 100th Cong., 1st Sess. (1987); H. R. 5217, 100th Cong., 2d Sess. (1988); H. R. 1090, 101st Cong., 1st Sess. (1989); H. R. 1953, 101st Cong., 1st Sess. (1989); H. R. 2709, 101st Cong., 1st Sess. (1989); H. R. 3119, 101st Cong., 1st Sess. (1989); S. 88, 101st Cong., 1st Sess. (1989); S. 271, 101st Cong., 1st Sess. (1989); S. 1225, 101st Cong., 1st Sess. (1989); S. 1228, 101st Cong., 1st Sess. (1989); S. 1970, 101st Cong., 1st Sess. (1989); S. 1971, 101st Cong., 1st Sess. (1989); H. R. 3918, 101st Cong., 2d Sess. (1990); H. R. 4079, 101st Cong., 2d Sess. (1990); H. R. 4737, 101st Cong., 2d Sess. (1990); H. R. 4820, 101st Cong., 2d Sess. (1990); H. R. 5055, 101st Cong., 2d Sess. (1990); H. R. 5269, 101st Cong., 2d Sess. (1990); S. 2245, 101st Cong., 2d Sess. (1990); S. 2695, 101st Cong., 2d Sess. (1990); H. R. 18, 102d Cong., 1st Sess. (1991); H. R. 365, 102d Cong., 1st Sess. (1991); H. R. 1400, 102d Cong., 1st Sess. (1991); H. R. 3371, 102d Cong., 1st Sess. (1991); S. 19, 102d Cong., 1st Sess. (1991); S. 148, 102d Cong., 1st Sess. (1991); S. 149, 102d Cong., 1st Sess. (1991); S. 620, 102d Cong., 1st Sess. (1991); S. 635, 102d Cong., 1st Sess. (1991); S. 1151, 102d Cong., 1st Sess. (1991); S. 1241, 102d Cong., 1st Sess. (1991); S. 1335, 102d Cong., 1st Sess. (1991); S. 2305, 102d Cong., 2d Sess. (1992); S. 3292, 102d Cong., 2d Sess. (1992); H. R. 2217, 103d Cong., 1st Sess. (1993); H. R. 2321, 103d Cong., 1st Sess. (1993); H. R. 2847, 103d Cong., 1st Sess. (1993); H. R. 2872, 103d Cong., 1st Sess. (1993); H. R. 3131, 103d Cong., 1st Sess. (1993); H. R. 3315, 103d Cong., 1st Sess. (1993); S. 8, 103d Cong., 1st Sess.

(1993); S. 38, 103d Cong., 1st Sess. (1993); S. 47, 103d Cong., 1st Sess. (1993); S. 1356, 103d Cong., 1st Sess. (1993); S. 1441, 103d Cong., 1st Sess. (1993); S. 1488, 103d Cong., 1st Sess. (1993); S. 1607, 103d Cong., 1st Sess. (1993); S. 1657, 103d Cong., 1st Sess. (1993); H. R. 4018, 103d Cong., 2d Sess. (1994); H. R. 4055, 103d Cong., 2d Sess. (1994); H. R. 4079, 103d Cong., 2d Sess. (1994); H. R. 4092, 103d Cong., 2d Sess. (1994); H. R. 4197, 103d Cong., 2d Sess. (1994); H. R. 4848, 103d Cong., 2d Sess. (1994); H. R. 5008, 103d Cong., 2d Sess. (1994); H. R. 5134, 103d Cong., 2d Sess. (1994); S. 2389, 103d Cong., 2d Sess. (1994); H. R. 3, 104th Cong., 1st Sess. (1995); H. R. 729, 104th Cong., 1st Sess. (1995); H. R. 920, 104th Cong., 1st Sess. (1995); H. R. 2703, 104th Cong., 1st Sess. (1995); S. 3, 104th Cong., 1st Sess. (1995); S. 623, 104th Cong., 1st Sess. (1995); S. 735, 104th Cong., 1st Sess. (1995); S. 816, 104th Cong., 1st Sess. (1995).

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join, concurring in the judgment.

I agree with the Court that the judgment of the Court of Appeals should be reversed, but I am in sufficient disagreement with the Court's reasoning to write separately. I disagree with the Court's statement that "the Court of Appeals order vacating the stay is lawful *only if* dismissal of the petition would have been lawful." *Ante,* at 319. This statement, I believe, misreads our opinion in *Barefoot* v. *Estelle,* 463 U. S. 880 (1983), and ignores our reasoning in *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.,* 503 U. S. 653 (1992).

The order under review does not dispose of a petition for a writ of habeas corpus; it vacates a stay of execution. The Court dismisses this distinction as a "preliminary matter," which "makes no difference," because "the Court of Appeals order vacating the stay is lawful *only if* dismissal of the petition would have been lawful." *Ante,* at 319. In my view, the fact that we are reviewing an order vacating a stay is anything but "preliminary."

The Court is correct inasmuch as the underlying petition's likelihood of success is one factor to be considered in determining whether a stay should be entered. See *Hilton* v. *Braunskill*, 481 U. S. 770, 776 (1987). Rule 9 of the Rules Governing § 2254 Cases sets forth the grounds upon which a habeas petition may be dismissed other than the merits. Under Rule 9(b), a petition may be dismissed if it is found to be successive or abusive. Under Rule 9(a) it may also be dismissed

> "if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred." 28 U. S. C. § 2254 Rule 9(a).

In this case, there was no basis for denying a stay on the ground that petitioner's habeas claims are without merit; for the purposes of considering the stay application, it is undisputed that those claims are substantial. Because the habeas petition was petitioner's first, it would also have been inappropriate to deny a stay on the ground that the petition could have been dismissed under Rule 9(b). I agree with the majority, *ante*, at 326, that, on the record before us, the petition likewise could not have been dismissed under Rule 9(a), because the Rule's elements were not satisfied. Although the District Court determined that petitioner engaged in delay, it made no determination that the delay prejudiced the State's ability to respond to the petition, within the meaning of Rule 9(a), by depriving the State of adequate time to respond or otherwise.

However, an applicant's likelihood of success is not the only consideration in determining whether he is entitled to a stay.

See *Hilton, supra,* at 776. The Habeas Rules say little if anything about this determination, and understandably so. It must be remembered the statutes governing habeas corpus, 28 U. S. C. §§2241–2255, were enacted in 1948, before the writ developed into a vehicle for federal courts "to reexamine federal constitutional issues even after trial and review by a state," *Brown* v. *Allen,* 344 U. S. 443, 459 (1953), and long before this Court declined to declare the death penalty unconstitutional, in *Gregg* v. *Georgia,* 428 U. S. 153 (1976), *Proffitt* v. *Florida,* 428 U. S. 242 (1976), and *Jurek* v. *Texas,* 428 U. S. 262 (1976). It would have been difficult for Congress to have anticipated the issues that arise in a system in which state death sentences are presumptively valid, but are "reexamined" in federal court before execution to consider constitutional challenges to the manner in which they were imposed.

In the typical noncapital habeas case, it is relatively easy to rule on an application to stay execution of a state sentence by consulting ordinary principles governing stays. Rarely, if ever, does a noncapital petitioner seek a stay of his sentence before the district court has passed on the merits of his petition. When a petitioner does make such a request, he usually has little chance of success on the merits, since he has been confined pursuant to a presumptively valid final judgment of conviction rendered by a state court. See 28 U. S. C. §2254(d). If, after entertaining his petition, the district court awards the writ, the "stay equities" shift in favor of the petitioner, who will be enlarged unless the State can demonstrate that the equities counsel otherwise. *Hilton, supra,* at 774.

This easily managed system can be adapted to govern capital habeas cases, so long as the capital petitioner files his habeas petition sufficiently in advance of his execution date. If he files in a timely fashion, the district court may then consider the petition in due course, without in any way disturbing the sentence or execution date before ruling on the petition's merits. But if, as in this case, the petitioner instead files an "eleventh hour" federal habeas petition, the customary principles must be revised accordingly. The district court may feel that it simply does not have time before the date of execution to adequately consider the merits of petitioner's claims, and will naturally be disposed, as the District Court was here, to enter a stay to enable it to do so.[1] In so doing, the district court sets aside a scheduled state execution of sentence, imposed by a presumptively valid final state judgment of conviction, on the basis of a tentative assessment that the judgment violates a federal constitutional right. Unless the eleventh-hour nature of the petition is taken into account, the late filing may induce the federal court to disregard federal-state comity and "frustrate . . . the States' sovereign power to punish offenders," *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982), when such interference might have been avoided by timely filing.[2] The customary principles must also be revised to account for an attempt by a petitioner to manipulate the district court into granting relief where relief is clearly precluded.

In *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653 (1992), this Court demonstrated how last-minute or manipulative uses of the stay power constitute equitable grounds which can justify the denial of an application for stay of a state-court order of execution. The Court vacated a stay of execution issued on behalf of Robert Alton Harris, a California prisoner, pending consideration of a 42 U. S. C. § 1983 action alleging that his method of execution violated the Eighth Amendment. See 503 U. S., at 653. Because Harris had not raised the Eighth Amendment claim in any of the four federal habeas corpus petitions he had filed over 10 years, the Court considered the § 1983 claim "an obvious attempt to avoid the application of *McCleskey* v. *Zant*, 499 U. S. 467 (1991), to bar this successive claim for relief." *Ibid.* We could have vacated the stay on the basis of the successive-petition bar alone, but we explicitly did not:

---

[1] The Court is not concerned by this prospect because district courts have discretion to "order expansion of the record," authorize discovery, decide "whether to hold an evidentiary hearing," and generally "expedite proceedings." *Ante*, at 326. These tools are useless, however, when a petitioner deliberately leaves the district court only one day to review a petition's claims.

[2] Of course, there may be cases in which the eleventh-hour nature of the petition is attributable to the State's scheduling the execution date before the petitioner may appeal the denial of postconviction relief in a timely manner, not to the petitioner's deliberate refusal to seek relief. I am certain that district courts are capable of distinguishing between the two situations.

> "Even if we were to assume, however, that Harris could avoid the application of *McCleskey* to bar his claim, we would not consider it on the merits. Whether his claim is framed as a habeas petition or as a § 1983 action, Harris seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation. This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Id.*, at 653–654 (citations omitted).

Our order confirms that "abusive delay"—waiting until the last minute to submit a claim that could have been submitted earlier—and "obvious attempt[s] at manipulation"—in that case, asking the court to exercise its equitable powers in defiance of a clearly applicable legal rule precluding relief on the merits—constitute equities to be considered in ruling on the prayer for relief. More important, because we explained that this misconduct constituted sufficient grounds to deny Harris' stay application, "[e]ven if" *McCleskey* did not bar his claim, we made clear that such abuse may tip the scales decisively against a stay applicant regardless of the applicant's likelihood of success on the merits.[3]

Gomez also confirms that a habeas petitioner's misconduct in applying for a stay may disentitle him to the stay even if the petition is his first. The inequitable conduct *Gomez* criticized, abusive delay and manipulation, may be present in any stay application. In *Gomez* we did not equivocate when we said: "Equity must take into consideration [an] obvious attempt at manipulation. . . . A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." 503 U. S., at 654 (citations omitted). It may be admitted that there would be a stronger presumption in favor of deciding the merits of a first-time petition than for a successive petition. The successive nature of a petition gives rise to an additional concern counseling against review of the merits: that the petitioner is frustrating the State's attempts to execute its judgment by exploiting the fact that ordinary principles of res judicata do not apply in habeas corpus. *McCleskey* v. *Zant*, 499 U. S. 467, 479, 491–492 (1991). It does not follow, however, that because a first-time petitioner does not abuse the writ under Rule 9(b) he may never be found to have engaged in the misconduct we criticized in *Gomez;* it means only that misconduct by such a petitioner is less likely to result in a refusal to grant a stay in order to consider the merits of the petition.

The majority attempts to distinguish *Gomez* because the matter before the Court in that case was "not a *first* habeas petition." *Ante*, at 321. This reading is wholly implausible, because the first paragraph of the Court's order had already discussed the fact that Harris was not a first-time petitioner.

---

[3] The § 1983 action was a class-action suit, of which Harris was one member. I note that the claim that the Court declined to consider on the merits has enough merit for the class plaintiffs to have prevailed in district court and the court of appeals. *Fierro* v. *Gomez*, 77 F. 3d 301 (CA9 1996).

If the paragraph about Harris' misconduct in relation to his application, quoted above, had legal significance only if his petition was successive, it would have been superfluous.

To support its view that a stay must be granted if a first federal habeas petition is not dismissed, the Court relies on our decision in *Barefoot* v. *Estelle,* 463 U. S. 880 (1983). But *Barefoot* and the present case arose in different contexts. The question presented and decided in *Barefoot* only addressed how the merits of the habeas petition may determine whether the petitioner obtains a stay. *Id.,* at 887 (announcing the Court was considering "the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal habeas corpus petitioner"); *id.,* at 891 (affirming the denial of a stay because the Court of Appeals "ruled on the merits of [Barefoot's] appeal"). The issue in the present case is quite different: whether a petitioner's course of conduct in seeking the writ may be considered by the district court in deciding whether to grant a stay. To the extent that the Court's reading of *Barefoot* depends on the belief that a decision on a first federal habeas petition is somehow necessary to validate a state conviction, the Court ignores *Barefoot*'s assertion to the contrary:

> "The role of federal habeas proceedings . . . is secondary and limited. Federal courts are not forums in which to relitigate state trials. . . . The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error." *Id.,* at 887–888.

And, contrary to the Court's refusal to consider whether *Barefoot*'s "rationale" might brook a distinction between seasonable and eleventh-hour first habeas petitions, *ante,* at 321, our opinion warned that federal habeas corpus is *not* "a means by which a defendant is entitled to delay an execution indefinitely." 463 U. S., at 887.

I nonetheless agree with the Court that the Court of Appeals erred in vacating the stay granted in this case by the District Court. The District Court did not consider whether petitioner's conduct in court constituted misconduct so abusive that it disentitled him to a stay; it focused solely on the likelihood that petitioner's habeas petition might be dismissed. Although the court determined that petitioner had "abused the writ," it did not rely on this finding to deny a stay, correctly concluding that a first habeas petition may not be dismissed on the basis of abuse of the writ. App. 61–62. There was no determination that petitioner's habeas petition could be dismissed under Rule 9(a). There is no other ground under which to dismiss a first petition other than the merits, and the Court of Appeals erred in concluding otherwise.

Although the findings supporting the District Court's determination that petitioner abused the writ would go a long way toward supporting affirmance on the ground that petitioner's misconduct disentitled him to a stay, reversal is still in order. I agree with the Court that petitioner's conduct in the next-friend proceedings "neither aggravate nor mitigate Lonchar's delay in filing." *Ante*, at 331. Petitioner may not be blamed for having asserted his competence and his control over his habeas claims, because our case law required the District Court to establish as much. See *Whitmore* v. *Arkansas*, 495 U. S. 149, 165 (1990). Nor should he be blamed for his brother's and sister's desire to protect him, although it would be a different case if the record established that his relatives and he were colluding to stay his execution but avoid putting his claims before the court, so as to keep his options open in the future. Because the District Court erred in concluding that petitioner was culpable for the course of the next-friend proceedings and "[i]t is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law," *Schlup* v. *Delo,* 513 U. S. 298, 333 (1995) (O'CONNOR, J., concurring) (citing *Cooter & Gell* v. *Hartmarx Corp.,* 496 U. S. 384, 405 (1990)), the District Court necessarily abused its discretion in determining there was abuse of the writ. Reconsideration of this determination and the other equities of petitioner's stay application is now in order. I therefore concur in the judgment of reversal.

SHIEH *v.* KAKITA ET AL.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 95–7587. Decided April 1, 1996*

In March 1996, this Court invoked Rule 39.8 to deny petitioner Shieh *in forma pauperis* status. To date, he has filed 10 petitions in this Court in less than three years. All were patently frivolous and were denied without recorded dissent.

Held: For the reasons discussed in *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1, Shieh is denied leave to proceed *in forma pauperis* in the instant cases, and the Clerk is directed not to accept any further petitions for certiorari from him in noncriminal matters unless he pays the required docketing fee and submits his petition in compliance with this Court's Rule 33.1. This order will not prevent Shieh from petitioning to challenge criminal sanctions which might be imposed against him, but it will allow this Court to devote its limited resources to the claims of petitioners who have not abused the certiorari process.

Motions denied.

PER CURIAM.

In these three petitions for certiorari, *pro se* petitioner Liang-Houh Shieh requests leave to proceed *in forma pauperis* under Rule 39 of this Court. We deny his requests pursuant to Rule 39.8. Shieh is allowed until April 22, 1996, within which to pay the docketing fees required by Rule 38 and to submit his petitions in compliance with this Court's Rule 33.1. We also direct the Clerk not to accept any further petitions for certiorari from Shieh in noncriminal matters unless he pays the docketing fee required by Rule 38 and submits his petition in compliance with Rule 33.1.

Shieh has abused this Court's certiorari process. In March 1996, we invoked Rule 39.8 to deny Shieh *in forma pauperis* status. See *Shieh* v. *State Bar of California,* 516

---

*Together with No. 95–7588, *Shieh* v. *United States Court of Appeals for the Ninth Circuit,* and No. 95–7589, *Shieh* v. *Krieger et al.,* also on motion for leave to proceed *in forma pauperis* to the same court.

U. S. 1170. To date, Shieh has filed 10 petitions in this Court in less than three years. All have been both patently frivolous and denied without recorded dissent.

We enter the order barring prospective filings for the reasons discussed in *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992). Shieh's abuse of the writ of certiorari has been in noncriminal cases, and so we limit our sanction accordingly. The order will not prevent Shieh from petitioning to challenge criminal sanctions which might be imposed against him. The order will, however, allow this Court to devote its limited resources to the claims of petitioners who have not abused our certiorari process.

It is so ordered.

JUSTICE STEVENS, dissenting.

For the reasons I have previously expressed, I respectfully dissent. See *Jones* v. *ABC–TV*, 516 U. S. 363, 364 (1996) (STEVENS, J., dissenting); *Attwood* v. *Singletary*, 516 U. S. 297, 298 (1996) (STEVENS, J., dissenting); *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1, 4 (1992) (STEVENS, J., dissenting); *Zatko* v. *California*, 502 U. S. 16, 18 (1991) (STEVENS, J., dissenting).

BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* WILLIAMS

ON APPLICATION TO VACATE STAY OF EXECUTION

No. A–828. Decided April 9, 1996

A Federal District Court denied respondent Williams' third habeas corpus petition, finding all of his claims to be abusive, successive, or procedurally defaulted. The Eighth Circuit subsequently entered a summary order staying Williams' pending execution, giving no explanation for its conclusion that such a stay was appropriate.

Held: The Eighth Circuit abused its discretion by entering a stay on this record. Entry of a stay on a second or third habeas petition is particularly egregious absent substantial grounds for relief. *Delo* v. *Blair,* 509 U. S. 823. No such grounds can be discerned here. The Magistrate's report adopted by the District Court meticulously addresses and rejects each of Williams' claims. To the extent that the Eighth Circuit discerned substantial grounds for relief, it failed to reveal them in its summary order. Entry of a stay without explanation is disfavored, cf. *Netherland* v. *Tuggle,* 515 U. S. 951 *(per curiam),* for this Court loses the benefit of the court of appeals' views and must resort to other portions of the record in evaluating whether to vacate the stay.

Application granted.

PER CURIAM.

Doyle J. Williams is scheduled to be executed by the State of Missouri on April 10, 1996. On January 11, 1996, a Federal District Court denied Williams' third federal habeas corpus petition, finding all of Williams' claims to be abusive, successive, or procedurally defaulted. On March 8, 1996, the United States Court of Appeals for the Eighth Circuit entered a summary order staying Williams' execution. The Court of Appeals scheduled oral argument for May 13, 1996, and resolved that the stay would remain in effect pending submission of the case and that court's further order. The summary order gives no explanation for the Court of Appeals' conclusion that oral argument is necessary or that entry of a stay was appropriate. The Court of Appeals denied a petition for rehearing en banc, and we now have before us an application to vacate the stay.

"A stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are 'substantial grounds upon which relief might be granted.'" *Delo* v. *Stokes,* 495 U. S. 320, 321 (1990) *(per curiam)* (quoting *Barefoot* v. *Estelle,* 463 U. S. 880, 895 (1983)). Entry of a stay on a second or third habeas petition is a drastic measure, and we have held that it is "'particularly egregious'" to enter a stay absent substantial grounds for relief. *Delo* v. *Blair,* 509 U. S. 823 (1993) (citation omitted). On the record before us, we can discern no such grounds. We are persuaded by the report prepared by Magistrate Judge Hays, which meticulously addresses each of Williams' claims and finds each to be abusive, successive, procedurally defaulted, or meritless, and by the District Court's order adopting that report, in which the District Court also denied Williams' dilatory motion to amend the habeas petition. The Court of Appeals abused its discretion by entering a stay on this record.

To the extent the Court of Appeals discerned substantial grounds for relief, it failed to reveal them in its summary order granting the stay. Although we hesitate to say that a court of appeals must, in every case, explain the basis for its entry of a stay, we see fit to remind the lower courts that entry of a stay without explanation is disfavored. Cf. *Netherland* v. *Tuggle,* 515 U. S. 951 (1995) *(per curiam).* When a court of appeals fails to articulate its reasons for granting a stay, we lose the benefit of that court's views and must resort to other portions of the record in evaluating whether to vacate the stay. In this case, the District Court's careful treatment of Williams' claims and the surface implausibility of those claims persuade us that the stay should not have been granted, and the Court of Appeals' summary order does not convince us otherwise.

Accordingly, the application to vacate the stay of execution is granted.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

I would deny the application to vacate the stay of Williams' execution. A diligent appellate court has granted a certificate of probable cause and scheduled this case for argument on May 13. Those actions signal to me the existence of reasons, not the absence of reasons, for granting a stay. At the very least, before acting irretrievably, this Court might have invited prompt clarification of the Court of Appeals' order. Appreciation of our own fallibility, and respect for the judgment of an appellate tribunal closer to the scene than we are, as I see it, demand as much.

COOPER *v.* OKLAHOMA

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 95–5207. Argued January 17, 1996—Decided April 16, 1996

Oklahoma law presumes that a criminal defendant is competent to stand trial unless he proves his incompetence by clear and convincing evidence. Applying that standard, a judge found petitioner Cooper competent on separate occasions before and during his trial for first-degree murder, despite his bizarre behavior and conflicting expert testimony on the issue. In affirming his conviction and death sentence, the Court of Criminal Appeals rejected his argument that the State's presumption of competence, combined with its clear and convincing evidence standard, placed such an onerous burden on him as to violate due process.

Held: Because Oklahoma's procedural rule allows the State to try a defendant who is more likely than not incompetent, it violates due process. Pp. 354–369.

(a) It is well settled that the criminal trial of an incompetent defendant violates due process. *Medina* v. *California*, 505 U. S. 437, 449, establishes that a State may presume that the defendant is competent and require him to prove incompetence by a preponderance of the evidence. Such a presumption does not offend a "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *id.*, at 445, for it affects the outcome "only in a narrow class of cases . . . where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent," *id.*, at 449. This case, however, presents the quite different question whether a State may proceed with a criminal trial after a defendant has shown that he is more likely than not incompetent. Pp. 354–356.

(b) Oklahoma's rule has no roots in historical practice. Both early English and American cases suggest that the common-law standard of proof was preponderance of the evidence. That this same standard is currently used by 46 States and the federal courts indicates that the vast majority of jurisdictions remain persuaded that Oklahoma's heightened standard is not necessary to vindicate the State's interest in prompt and orderly disposition of criminal cases. The near-uniform application of a standard that is more protective of the defendant's rights than Oklahoma's rule supports the conclusion that the heightened standard offends a deeply rooted principle of justice. Pp. 356–362.

(c) Oklahoma's rule does not exhibit "fundamental fairness" in operation. An erroneous determination of competence has dire consequences for a defendant who has already demonstrated that he is more likely than not incompetent, threatening the basic fairness of the trial itself. A defendant's inability to communicate effectively with counsel may leave him unable to exercise other rights deemed essential to a fair trial—*e. g.*, choosing to plead guilty, waiving his privilege against compulsory self-incrimination by taking the witness stand, or waiving his rights to a jury trial or to cross-examine witnesses—and to make a myriad of smaller decisions concerning the course of his defense. These risks outweigh the State's interest in the efficient operation of its criminal justice system. Difficulty in ascertaining whether a defendant is incompetent or malingering may make it appropriate to place the burden of proof on him, but it does not justify the additional onus of an especially high standard of proof. Pp. 362–367.

(d) Although it is normally within a State's power to establish the procedures through which its laws are given effect, the power to regulate procedural burdens is subject to proscription under the Due Process Clause when, as here, the procedures do not sufficiently protect a fundamental constitutional right. *Patterson* v. *New York*, 432 U. S. 197, distinguished. The decision herein is in complete accord with the ruling in *Addington* v. *Texas*, 441 U. S. 418, that due process requires a clear and convincing evidence standard of proof in involuntary civil commitment proceedings. That ruling protects an individual's fundamental liberty interest, while the ruling in this case safeguards the fundamental right not to stand trial while incompetent. Pp. 367–369.

889 P. 2d 293, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Robert A. Ravitz argued the cause and filed briefs for petitioner.

W. A. Drew Edmondson, Attorney General of Oklahoma, argued the cause for respondent. With him on the brief was *Sandra D. Howard,* Assistant Attorney General.*

---

*Briefs of *amici curiae* urging reversal were filed for the American Association on Mental Retardation et al. by *James W. Ellis* and *Barbara E. Bergman;* and for the National Association of Criminal Defense Lawyers by *Charles D. Weisselberg, Dennis E. Curtis, Denise Meyer,* and *Larry J. Fleming.*

A brief of *amicus curiae* urging affirmance was filed for the State of Utah et al. by *Jan Graham,* Attorney General of Utah, *J. Kevin Murphy,* JUSTICE STEVENS delivered the opinion of the Court.

In Oklahoma the defendant in a criminal prosecution is presumed to be competent to stand trial unless he proves his incompetence by clear and convincing evidence. Okla. Stat., Tit. 22, § 1175.4(B) (1991). Under that standard a defendant may be put to trial even though it is more likely than not that he is incompetent. The question we address in this case is whether the application of that standard to petitioner violated his right to due process under the Fourteenth Amendment.

I

In 1989 petitioner was charged with the brutal killing of an 86-year-old man in the course of a burglary. After an Oklahoma jury found him guilty of first-degree murder and recommended punishment by death, the trial court imposed the death penalty. The Oklahoma Court of Criminal Appeals affirmed the conviction and sentence.

Petitioner's competence was the focus of significant attention both before and during his trial. On five separate occasions a judge considered whether petitioner had the ability to understand the charges against him and to assist defense counsel. On the first occasion, a pretrial judge relied on the opinion of a clinical psychologist employed by the State to find petitioner incompetent. Based on that determination, he committed petitioner to a state mental health facility for treatment.

Assistant Attorney General, and *Carol Clawson*, Solicitor General, *John M. Bailey*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Gale A. Norton* of Colorado, *M. Jane Brady* of Delaware, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Carla J. Stovall* of Kansas, *Michael C. Moore* of Mississippi, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Tom Udall* of New Mexico, *Betty D. Montgomery* of Ohio, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, and *James S. Gilmore III* of Virginia.

Upon petitioner's release from the hospital some three months later, the trial judge heard testimony concerning petitioner's competence from two state-employed psychologists. These experts expressed conflicting opinions regarding petitioner's ability to participate in his defense. The judge resolved the dispute against petitioner, ordering him to proceed to trial.

At the close of a pretrial hearing held one week before the trial was scheduled to begin, the lead defense attorney raised the issue of petitioner's competence for a third time. Counsel advised the court that petitioner was behaving oddly and refusing to communicate with him. Defense counsel opined that it would be a serious matter "if he's not faking." App. 6. After listening to counsel's concerns, however, the judge declined to revisit his earlier determination that petitioner was competent to stand trial.

Petitioner's competence was addressed a fourth time on the first day of trial, when petitioner's bizarre behavior prompted the court to conduct a further competency hearing at which the judge observed petitioner and heard testimony from several lay witnesses, a third psychologist, and petitioner himself.[1] The expert concluded that petitioner was

---

[1] During the hearing petitioner, who had refused to change out of prison overalls for the trial because the proffered clothes were "burning" him, Tr. of Pretrial Motions and Competency Hearings 3–4 (May 4–5, 1992), talked to himself and to an imaginary "spirit" who petitioner claimed gave him counsel. On the witness stand petitioner expressed fear that the lead defense attorney wanted to kill him.

In his argument at the close of the proceeding, defense counsel reminded the court of an incident that occurred during petitioner's testimony:

"Every time I would get close to his space where he is seated in this little witness enclave . . . he would stand up and he would get away from me as far as he could and so I would back off and I'd give him a little space. . . . So, I've approached him from every side. . . . except I haven't approached him from the front. So yesterday, I approach him from the front. And that's the last thing I did. I regret doing that.

"He stood up and he got as far back against the rail behind the witness chair as he could get. I edged closer. He got as far back and he got up presently incompetent and unable to communicate effectively with counsel, but that he could probably achieve competence within six weeks if treated aggressively. While stating that he did not dispute the psychologist's diagnosis, the trial judge ruled against petitioner. In so holding, however, the court voiced uncertainty:

> "Well, I think I've used the expression . . . in the past that normal is like us. Anybody that's not like us is not normal, so I don't think normal is a proper definition that we are to use with incompetence. My shirtsleeve opinion of Mr. Cooper is that he's not normal. Now, to say he's not competent is something else.
>
> . . . . .
>
> "But you know, all things considered, I suppose it's possible for a client to be in such a predicament that he can't help his defense and still not be incompetent. I suppose that's a possibility, too.
>
> "I think it's going to take smarter people than me to make a decision here. I'm going to say that I don't believe he has carried the burden by clear and convincing evidence of his incompetency and I'm going to say we're going to go to trial." *Id.*, at 42–43.

---

on that rail. So I've got him up on the rail and I'm thinking, hey, what can I lose? Let me just see what he does now because he can go no further back, but as the Court knows, there's a space of about two-and-a-half feet behind this rail and a marble wall.

"Without looking for his safety at all and looking what's behind him, when I moved the least bit and I didn't move very far towards him, he fell to get away from me. He fell. He hit his head. The thud on that marble when he jackknifed backward off of that railing into that marble could be heard at the back of that courtroom. . . .

"We got him back up here in the witness enclave, he's just busted his head, tears are streaming down his eyes and he does not respond in any normal fashion." App. 37–38.

Incidents that occurred during the trial,[2] as well as the sordid history of petitioner's childhood that was recounted during the sentencing phase of the proceeding, were consistent with the conclusions expressed by the expert. In a final effort to protect his client's interests, defense counsel moved for a mistrial or a renewed investigation into petitioner's competence. After the court summarily denied these motions, petitioner was convicted and sentenced to death.

In the Court of Criminal Appeals, petitioner contended that Oklahoma's presumption of competence, combined with its statutory requirement that a criminal defendant establish incompetence by clear and convincing evidence, Okla. Stat., Tit. 22, § 1175.4(B) (1991),[3] placed such an onerous burden on him as to violate his right to due process of law. The appellate court rejected this argument. After noting that it can be difficult to determine whether a defendant is malingering, given "the inexactness and uncertainty attached to [competency] proceedings," the court held that the standard was justified because the "State has great interest in assuring its citizens a thorough and speedy judicial process," and because a "truly incompetent criminal defendant, through his attorneys and experts, can prove incompetency with relative ease." 889 P. 2d 293, 303 (1995). We granted certiorari to review the Court of Criminal Appeals' conclusion that application of the clear and convincing evidence standard does not violate due process. 516 U. S. 910 (1995).

---

[2] Petitioner did not communicate with or sit near defense counsel during the trial. Through much of the proceedings he remained in prison overalls, crouching in the fetal position and talking to himself.

[3] Section 1175.4(B) provides, in relevant part: "The court, at the hearing on the application [for determination of competency], shall determine, by clear and convincing evidence, if the person is incompetent. The person shall be presumed to be competent for the purposes of the allocation of the burden of proof and burden of going forward with the evidence."

Section 1175.4 was amended in 1991, during the pretrial period of petitioner's prosecution. The amendment did not alter the text of subsection B.

II

No one questions the existence of the fundamental right that petitioner invokes. We have repeatedly and consistently recognized that "the criminal trial of an incompetent defendant violates due process." *Medina* v. *California*, 505 U. S. 437, 453 (1992); *Drope* v. *Missouri*, 420 U. S. 162, 171–172 (1975); *Pate* v. *Robinson*, 383 U. S. 375, 378 (1966). Nor is the significance of this right open to dispute. As JUSTICE KENNEDY recently emphasized:

> "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. *Drope* v. *Missouri*, 420 U. S. 162, 171–172 (1975)." *Riggins* v. *Nevada*, 504 U. S. 127, 139–140 (1992) (opinion concurring in judgment).[4]

The test for incompetence is also well settled. A defendant may not be put to trial unless he "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him.'" *Dusky* v. *United States*, 362 U. S. 402, 402 (1960) *(per curiam)*.[5]

---

[4] Indeed, the right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination. See *Pate* v. *Robinson*, 383 U. S. 375, 384 (1966).

[5] The Oklahoma statute defines competence as "the present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him and to effectively and

Our recent decision in *Medina* v. *California*, 505 U. S. 437 (1992), establishes that a State may presume that the defendant is competent and require him to shoulder the burden of proving his incompetence by a preponderance of the evidence. *Id.*, at 449. In reaching that conclusion we held that the relevant inquiry was whether the presumption " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Id.*, at 445 (quoting *Patterson* v. *New York*, 432 U. S. 197, 202 (1977)). We contrasted the "deep roots in our common-law heritage" underlying the prohibition against trying the incompetent with the absence of any settled tradition concerning the allocation of the burden of proof in a competency proceeding. 505 U. S., at 446. Our conclusion that the presumption of competence offends no recognized principle of "fundamental fairness" rested in part on the fact that the procedural rule affects the outcome "only in a narrow class of cases where the evidence is in equipoise; that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent." *Id.*, at 449.[6]

The question we address today is quite different from the question posed in *Medina*. Petitioner's claim requires us to consider whether a State may proceed with a criminal trial after the defendant has demonstrated that he is more likely than not incompetent. Oklahoma does not contend that it may require the defendant to prove incompetence beyond a reasonable doubt.[7] The State maintains, however, that the clear and convincing standard provides a reasonable accom-

---

rationally assist in his defense." Okla. Stat., Tit. 22, § 1175.1(1) (Supp. 1996).

[6] In her concurring opinion, JUSTICE O'CONNOR expressed the view that placing the burden on the defendant in this limited group of cases was permissible because it provided the defendant with an incentive to cooperate with the information-gathering process necessary to a reliable competency determination. *Medina*, 505 U. S., at 455.

[7] Tr. of Oral Arg. 46–48.

modation of the opposing interests of the State and the defendant. We are persuaded, by both traditional and modern practice and the importance of the constitutional interest at stake, that the State's argument must be rejected.

III

"Historical practice is probative of whether a procedural rule can be characterized as fundamental," *Medina,* 505 U. S., at 446. In this case, unlike in *Medina,* there is no indication that the rule Oklahoma seeks to defend has any roots in prior practice. Indeed, it appears that a rule significantly more favorable to the defendant has had a long and consistent application.

We turn first to an examination of the relevant common-law traditions of England and this country. The prohibition against trying the incompetent defendant was well established by the time Hale and Blackstone wrote their famous commentaries. 4 W. Blackstone, Commentaries *24 ("[I]f a man in his sound memory commits a capital offence . . . [a]nd if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence?"); 1 M. Hale, Pleas of the Crown *34–*35 (same). The English cases which predate our Constitution provide no guidance, however, concerning the applicable standard of proof in competency determinations. See *Trial of Charles Bateman* (1685), reported in 11 How. St. Tr. 464, 467 (1816), and Hawles, *Remarks on the Trial of Mr. Charles Bateman,* 11 How. St. Tr. 474, 476 (1816) (noting that the court in the 1685 trial incurred "censure" for proceeding to trial with a doubt as to the defendant's competence); *Kinloch's Case* (1746), 18 How. St. Tr. 395, 411 (1813); *King* v. *Steel,* 1 Leach 452, 168 Eng. Rep. 328 (1787).

Beginning in the late 18th century, cases appear which provide an inkling of the proper standard. In *King* v. *Frith,* 22 How. St. Tr. 307 (1790), for example, the court instructed the jury to "diligently inquire . . . whether John Frith, the now prisoner at the bar . . . be of sound mind and understanding or not . . . ." *Id.*, at 311. Some 50 years later the jurors received a nearly identical admonition in *Queen* v. *Goode*, 7 Ad. & E. 536, 112 Eng. Rep. 572 (K. B. 1837): "'You shall diligently inquire, and true presentment make . . . whether John Goode . . . be insane or not . . . .'" *Id.*, at 536, n. *(a)*, 112 Eng. Rep., at 572–573, n. *(a)*2.[8] Similarly, in *King* v. *Pritchard*, 7 Car. & P. 303, 173 Eng. Rep. 135 (1836), the court empaneled a jury to consider "whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial . . . ." *Ibid.* See also *King* v. *Dyson*, 73 Car. & P. 305, n. *(a)*, 173 Eng. Rep. 135–136, n. *(a)* (1831); *Queen* v. *Southey*, 4 F. & F. 864, 895, 176 Eng. Rep. 825, 838 (1865); *Queen* v. *Berry*, 1 Q. B. Rep. 447, 449 (1876). *Ibid.*[9]

These authorities, while still speaking less clearly than we might wish, are instructive. By phrasing the inquiry in a simple disjunctive, *Frith, Goode,* and *Pritchard* suggest that traditional practice required the jury to determine whether the defendant was "more likely than not" incompetent. Nothing in the jury instructions of these cases will bear the interpretation of a clear and convincing standard. What is more, the cases contain no indication that the use of a preponderance standard represented a departure from earlier (pre-Constitution) practice.[10]

---

[8] Courts often referred to the prisoner's insanity (or present insanity) rather than incompetence, even when the proceeding concerned the defendant's competence to stand trial. Beginning with the earliest cases, the issue at a sanity or competency hearing has been "whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge." *King* v. *Pritchard*, 7 Car. & P. 303, 304, 173 Eng. Rep. 135 (1836).

[9] In 1800 England codified the common-law rule that a court could empanel a jury to determine whether a defendant charged with treason, murder, or a felony offense was competent to stand trial. Criminal Lunatics Act, 1800, 39 & 40, Geo. 3, ch. 94, § 2.

Modern English authority confirms our interpretation of these early cases as applying a preponderance standard. Relying on "principles . . . laid down in a number of cases," including *Pritchard* and *King* v. *Dyson,* 7 Car. & P. 305, n. *(a),* 173 Eng. Rep. 135, n. *(a)* (1831), the court in *Queen* v. *Podola,* 43 Crim. App. 220, 3 All E. R. 418 (1959), ruled:

> "If the contention that the accused is insane is put forward by the defence and contested by the prosecution, there is, in our judgment, a burden upon the defence of satisfying the jury of the accused's insanity. In such a case, as in other criminal cases in which the onus of proof rests upon the defence, the onus is discharged if the jury are satisfied on the balance of probabilities that the accused's insanity has been made out." *Id.,* at 235, 3 All E. R., at 429.[11]

---

[10] Indeed, although in *Medina* we concluded that it is permissible for a State to require the defendant to shoulder the burden of demonstrating his incompetence, we noted that some 19th-century English authorities placed the burden on the prosecutor once competence was put in issue. *Medina* v. *California,* 505 U. S., at 447. See *Queen* v. *Davies,* 3 Car. & K. 328, 329, 175 Eng. Rep. 575, 575 (1853) (judge ruled that "[the prosecutor] should begin, and call his witnesses, to show that the prisoner is sane, and capable of pleading"); *Ley's Case,* 1 Lewin 239, 240, 168 Eng. Rep. 1026 (1828) ("'If there be a doubt as to the prisoner's sanity . . . you cannot say that he is in a fit state to be put upon his trial'"). See also Halsbury, 10 Laws of England 403 (3d ed. 1955) ("Where a jury is so empanelled [to determine competency], the onus is on the prosecution to prove the sanity of the defendant"). But see *Queen* v. *Podola,* 43 Crim. App. 220, 236, 3 All E. R. 418, 430 (1959) (explicitly rejecting the suggestion that the prosecutor must prove the defendant's competence to stand trial). Given the disagreement among English courts concerning which party bore the burden of proof, it is unlikely that in cases in which the burden was placed on the defendant that burden was as weighty as clear and convincing evidence.

[11] The *Podola* court opined that the tests laid down in *Pritchard* "have been followed so often that they may be said to be firmly embodied in our law." 43 Crim. App., at 238, 3 All E. R., at 431.

Likewise, we are aware of no decisional law from this country suggesting that any State employed Oklahoma's heightened standard until quite recently. Rather, the earliest available sources typically refer to English authorities, see, *e. g., Freeman* v. *People,* 47 Am. Dec. 216, 223–225 (N. Y. 1847), *State* v. *Harris,* 78 Am. Dec. 272, 272–275 (N. C. 1860) (adopting procedures outlined in *King* v. *Dyson,* 7 Car. & P. 305, n. *(a),* 173 Eng. Rep. 135, n. *(a)* (1831), and *King* v. *Pritchard,* 7 Car. & P. 303, 173 Eng. Rep. 135 (1836)), and employ the disjunctive language used by the English courts, see, *e. g., Commonwealth* v. *Hathaway,* 13 Mass. 299 (1816); *People* v. *Kleim,* 1 N. Y. 13, 15 (1845); *Harris,* 78 Am. Dec., at 275; *United States* v. *Chisolm,* 149 F. 284, 290 (SD Ala. 1906).[12] By the turn of the 20th century, however, American courts were explicitly applying a preponderance standard. In 1896, Ohio juries were instructed that "[t]he burden is upon the prisoner to show by a preponderance of the proof that he is insane." *State* v. *O'Grady,* 5 Ohio Dec. 654, 655 (1896).[13] Some 15 years later, the Tennessee Supreme Court described the competency determination as

---

[12] In *Commonwealth* v. *Braley,* 1 Mass. 102, 103 (1804), a case decided shortly after the Constitution was ratified, the court instructed the jury to consider "whether [the accused] neglected or refused to plead to the indictment against him for murder, of his free will and malice, or whether he did so neglect by the act of God." This instruction may be a precursor to the "sane or insane" disjunctive.

[13] See also *State* v. *Tyler,* 7 Ohio N. P. 443, 444 (1898) ("What I mean by the preponderance of the evidence is that the accused must show that he is now at the time of this trial probably not sane"). Cf. *People* v. *Ah Ying,* 42 Cal. 18, 20 (1872) (jury should find defendant presently insane if "satisfied" by the evidence supporting that conclusion).

Both *Tyler* and *State* v. *O'Grady* are instructive concerning the proper interpretation of the authorities which articulate no standard of proof but phrase the inquiry in the disjunctive. In each case the jury was told that its task was to determine whether the accused "is or is not sane," *Tyler,* 7 Ohio N. P., at 443, see also *O'Grady,* 5 Ohio Dec., at 654, and then explicitly instructed that the defendant bore the burden of proof by a preponderance of the evidence. *Tyler,* 7 Ohio N. P., at 443; *O'Grady,* 5 Ohio Dec., at 655.

"controlled by the preponderance of the proof," *Jordan* v. *State,* 124 Tenn. 81, 89, 135 S. W. 327, 329 (1911), and the highest court of Pennsylvania held that competence is "decided by a preponderance of the evidence," *Commonwealth* v. *Simanowicz,* 242 Pa. 402, 405, 89 A. 562, 563 (1913).[14] These early authorities are bereft of language susceptible of supporting a clear and convincing evidence standard.[15]

Contemporary practice demonstrates that the vast majority of jurisdictions remain persuaded that the heightened standard of proof imposed on the accused in Oklahoma is not necessary to vindicate the State's interest in prompt and orderly disposition of criminal cases. Only 4 of the 50 States presently require the criminal defendant to prove his incompetence by clear and convincing evidence.[16] None of the remaining 46 jurisdictions imposes such a heavy burden on the defendant.[17] Indeed, a number of States place no burden on the defendant at all, but rather require the prosecutor to

---

[14] See also *State* v. *Arnold,* 12 Iowa 479, 484 (1861) ("A doubt must be raised whether at the time there is such mental impairment . . . as to render it probable that the prisoner can not, as far as may devolve upon him, have a full, fair and impartial trial"); *People* v. *McElvaine,* 125 N. Y. 596, 608, 26 N. E. 929, 933 (1891) (the court "was familiar with the appearance and conduct of the prisoner during the period of that trial, and had sufficient grounds before it to judge as to the probability of his present sanity"). See also *Crocker* v. *State,* 19 N. W. 435, 436 (Wis. 1884); *United States* v. *Chisolm,* 149 F. 284, 290 (SD Ala. 1906).

Several of the early cases explicitly mention the common-law roots of the State's statutory procedure for determining competency. See *People* v. *McElvaine,* 125 N. Y., at 608, 26 N. E., at 932 ("We do not think the Code of Criminal Procedure has made any radical change in the mode of procedure or the character of the [competency] proceedings"); *French* v. *State,* 67 N. W. 706, 710 (Wis. 1896) ("The statute . . . providing for an inquisition, where there is a probability that the accused is, at the time of his trial, insane, and thereby incapacitated to act for himself, to determine whether he is so insane, is substantially a provision in affirmance of a power the court had at common law in such cases, as abundantly appears from the authorities").

[15] Oklahoma all but concedes that early common law and statutory decisions employed a standard of proof lower than clear and convincing. See Brief for Respondent 21–23.

[16] Conn. Gen. Stat. § 54–56d(b) (1995); Okla. Stat., Tit. 22, § 1175.4 (1991); 50 Pa. Cons. Stat. § 7403(a) (Supp. 1995); and R. I. Gen. Laws § 40.1–5.3–3 (Supp. 1995). The adoption of the clear and convincing evidence standard

---

by Oklahoma and Connecticut may have been a response to this Court's decision in *Addington* v. *Texas*, 441 U. S. 418 (1979). We discuss *Addington infra*, at 368–369.

[17] See *Lackey* v. *State*, 615 So. 2d 145, 151–152 (Ala. Crim. App. 1992); *McCarlo* v. *State*, 677 P. 2d 1268, 1272 (Alaska App. 1984); Cal. Penal Code Ann. § 1369(f) (West 1982); Colo. Rev. Stat. § 16–8–111(2) (1986); *Diaz* v. *State*, 508 A. 2d 861, 863 (Del. 1986); *Flowers* v. *State*, 353 So. 2d 1259, 1270 (Fla. App. 1978); *Johnson* v. *State*, 209 Ga. App. 514, 516, 433 S. E. 2d 717, 719 (1993); Haw. Rev. Stat. §§ 704–404 and 704–411 (1993); Ill. Comp. Stat., ch. 725, § 5/104–11(c) (1992); *Montano* v. *State*, 649 N. E. 2d 1053, 1057-1058 (Ind. App. 1995); *State* v. *Rhode*, 503 N. W. 2d 27, 35 (Iowa App. 1993); *State* v. *Seminary*, 165 La. 67, 72, 115 So. 370, 372 (1927); *Jolley* v. *State*, 282 Md. 353, 365, 384 A. 2d 91, 98 (1978); *Commonwealth* v. *Prater*, 420 Mass. 569, 573–574, 651 N. E. 2d 833, 837 (1995); Minn. Rule Crim. Proc. 20.01 (1995); *Griffin* v. *State*, 504 So. 2d 186, 191 (Miss. 1987); *State* v. *Zorzy*, 136 N. H. 710, 714–715, 622 A. 2d 1217, 1219 (1993); *State* v. *Lambert*, 275 N. J. Super. 125, 129, 645 A. 2d 1189, 1191 (1994); *State* v. *Chapman*, 104 N. M. 324, 327, 721 P. 2d 392, 395 (1986); *People* v. *Santos*, 43 App. Div. 2d 73, 75, 349 N. Y. S. 2d 439, 442 (1973); *State* v. *Heger*, 326 N. W. 2d 855, 858 (N. D. 1982); Ohio Rev. Code Ann. § 2945.37 (1993); *State* v. *Nance*, 466 S. E. 2d 349, 351 (S. C. 1996); S. D. Codified Laws § 23A–10A–6.1 (1988); *Jordan* v. *State*, 124 Tenn. 81, 89, 135 S. W. 327, 329 (1911); *Blacklock* v. *State*, 820 S. W. 2d 882, 886 (Tex. App. 1991); Utah Code Ann. § 77–15–5(10) (1995); Va. Code Ann. § 19.2–169.1(E) (1995); Wash. Rev. Code § 10.77.090 (1994); W. Va. Code § 27–6A–2(b) (1992); Wis. Stat. § 971.14(4)(b) (1985 and Supp. 1995); *Loomer* v. *State*, 768 P. 2d 1042, 1045 (Wyo. 1989).

The burden imposed in the remaining States is unclear. Nothing in the competency statutes or case law of these States suggests, however, that the defendant bears the burden of proving incompetence by clear and convincing evidence. See Ariz. Rule Crim. Proc. 11.5 (1987 and Supp. 1995); *Mitchell* v. *State*, 323 Ark. 116, 120, 913 S. W. 2d 264, 266 (1996); Idaho Code § 18–212 (1987); Kan. Stat. Ann. § 22–3302 (1995); Ky. Rev. Stat. Ann. § 504.100 (Michie 1990); Me. Rev. Stat. Ann., Tit. 15, § 101–B (Supp. 1995); Mich. Comp. Laws § 330.2020 (1992); *State* v. *Clark*, 546 S. W. 2d 455, 468 (Mo. App. 1976); Mont. Code Ann. § 46–14–221 (1992 and Supp. 1995); Neb. Rev. Stat. § 29–1823 (1989); Nev. Rev. Stat. § 178.415 (1992); N. C. Gen. Stat. § 15A–1002 (1988); Ore. Rev. Stat. §§ 161.360–161.370 (Supp. 1994); and Vt. Stat. Ann., Tit. 13, § 4817 (1974).

prove the defendant's competence to stand trial once a question about competency has been credibly raised.[18] The situation is no different in federal court. Congress has directed that the accused in a federal prosecution must prove incompetence by a preponderance of the evidence. 18 U. S. C. § 4241.

The near-uniform application of a standard that is more protective of the defendant's rights than Oklahoma's clear and convincing evidence rule supports our conclusion that the heightened standard offends a principle of justice that is deeply "rooted in the traditions and conscience of our people." *Medina* v. *California,* 505 U. S., at 445 (internal quotation marks omitted). We turn next to a consideration of whether the rule exhibits "'fundamental fairness' in operation." *Id.,* at 448 (quoting *Dowling* v. *United States,* 493 U. S. 342, 352 (1990)).

IV

Contemporary and historical procedures are fully consistent with our evaluation of the risks inherent in Oklahoma's practice of requiring the defendant to prove incompetence by clear and convincing evidence. In *Addington* v. *Texas,* 441 U. S. 418, 423 (1979), we explained that:

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' *In re Winship,* 397 U. S. 358, 370 (1970) (Harlan, J., concurring)."

The "more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision."

---

[18] See, *e. g.,* Haw. Rev. Stat. §§ 704-404 and 704-411 (1993); Ill. Comp. Stat., ch. 725, § 5/104-11(c) (1992); S. D. Codified Laws § 23A-10A-6.1 (1988); Wis. Stat. § 971.14(4)(b) (Supp. 1994 and Supp. II 1995).

Cruzan v. *Director, Mo. Dept. of Health,* 497 U. S. 261, 283 (1990). For that reason, we have held that due process places a heightened burden of proof on the State in civil proceedings in which the "individual interests at stake . . . are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky* v. *Kramer,* 455 U. S. 745, 756 (1982) (termination of parental rights) (quoting *Addington,* 441 U. S., at 424).[19]

Far from "jealously guard[ing]," *Jacob* v. *New York City,* 315 U. S. 752, 752–753 (1942), an incompetent criminal defendant's fundamental right not to stand trial, Oklahoma's practice of requiring the defendant to prove incompetence by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is competent. In *Medina* we found no comparable risk because the presumption would affect only the narrow class of cases in which the evidence on either side was equally balanced.

---

[19] See also *Addington* v. *Texas* (involuntary civil commitment); *Woodby* v. *INS,* 385 U. S. 276, 285–286 (1966) (deportation); *Chaunt* v. *United States,* 364 U. S. 350, 353 (1960) (denaturalization); *Schneiderman* v. *United States,* 320 U. S. 118, 125 (1943) (denaturalization).

Our opinions in *Cruzan* v. *Director, Mo. Dept. of Health,* 497 U. S. 261 (1990), and *Ohio* v. *Akron Center for Reproductive Health,* 497 U. S. 502 (1990), are not to the contrary. In *Cruzan* we held that the Due Process Clause does not prohibit Missouri from requiring a third party who seeks to terminate life-sustaining treatment to demonstrate by clear and convincing evidence that the incompetent person receiving such treatment would wish that step to be taken. 497 U. S., at 280. We reasoned that the heightened standard of proof was permissible because the decisionmaker was a surrogate for the incompetent individual, *id.,* at 280–281, and because the consequences of an erroneous decision were irreversible, *id.,* at 283. In *Akron Center for Reproductive Health* we upheld an Ohio statute that required an unmarried, unemancipated minor woman who sought to obtain an abortion without notifying a parent to prove by clear and convincing evidence that judicial bypass of the notification requirement was appropriate in her case. We approved the heightened standard of proof in that case largely because the proceeding at issue was *ex parte.* 497 U. S., at 515–516.

"Once a State provides a defendant access to procedures for making a competency evaluation," we stated, there is "no basis for holding that due process further requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial." 505 U. S., at 449. Unlike the presumption at issue in *Medina*, however, Oklahoma's clear and convincing evidence standard affects a class of cases in which the defendant has already demonstrated that he is more likely than not incompetent.

For the defendant, the consequences of an erroneous determination of competence are dire. Because he lacks the ability to communicate effectively with counsel, he may be unable to exercise other "rights deemed essential to a fair trial." *Riggins* v. *Nevada*, 504 U. S., at 139 (KENNEDY, J., concurring in judgment). After making the "profound" choice whether to plead guilty, *Godinez* v. *Moran*, 509 U. S. 389, 398 (1993), the defendant who proceeds to trial

> "will ordinarily have to decide whether to waive his 'privilege against compulsory self-incrimination,' *Boykin* v. *Alabama*, 395 U. S. 238, 243 (1969), by taking the witness stand; if the option is available, he may have to decide whether to waive his 'right to trial by jury,' *ibid.;* and, in consultation with counsel, he may have to decide whether to waive his 'right to confront [his] accusers,' *ibid.*, by declining to cross-examine witnesses for the prosecution." *Ibid.*

With the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense. The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a "fundamental component of our criminal justice system"[20]—the basic fairness of the trial itself.

---

[20] *United States* v. *Cronic*, 466 U. S. 648, 653 (1984).

By comparison to the defendant's interest, the injury to the State of the opposite error—a conclusion that the defendant is incompetent when he is in fact malingering—is modest. To be sure, such an error imposes an expense on the state treasury and frustrates the State's interest in the prompt disposition of criminal charges. But the error is subject to correction in a subsequent proceeding and the State may detain the incompetent defendant for "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competence] in the foreseeable future." *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972).[21]

The Oklahoma Court of Criminal Appeals correctly observed that the "inexactness and uncertainty" that characterize competency proceedings may make it difficult to determine whether a defendant is incompetent or malingering. 889 P. 2d, at 303. We presume, however, that it is unusual for even the most artful malingerer to feign incompetence successfully for a period of time while under professional care.[22] In this regard it is worth reiterating that only four jurisdictions currently consider it necessary to impose on the criminal defendant the burden of proving incompetence by clear and convincing evidence. Moreover, there is no reason to believe that the art of dissimilation is new. Eighteenth and nineteenth century courts, for example, warned jurors charged with making competency determinations that "'there may be great fraud in this matter,'" *King* v. *Dyson*, 7 Car. & P. 305, n. *(a)*, 173 Eng. Rep., at 136, n. *(a)* (quoting

---

[21] Under *Jackson*, if the defendant regains competence or is found to be malingering, the State may proceed to trial.

[22] Sir John Hawles, Solicitor General to King William III (who reigned from 1689–1702), noted that "there is a great difference between pretences and realities, and *sana* and *non sana memoria* hath been often tryed in capital matters, and the prisoners have reaped so little benefit by their pretences, it being always discovered, that we rarely hear of it." Hawles, *Remarks on the Trial of Mr. Charles Bateman* (1685), 11 How. St. Tr. 474, 478 (1816).

1 Hale, Pleas of the Crown, at *35), and that "[i]t would be a reproach to justice if a guilty man . . . postponed his trial upon a feigned condition of mind, as to his inability to aid in his defense," *United States* v. *Chisolm*, 149 F., at 288.[23] Although they recognized this risk, the early authorities did not resort to a heightened burden of proof in competency proceedings. See Part III, *supra*.

More fundamentally, while the difficulty of ascertaining where the truth lies may make it appropriate to place the burden of proof on the proponent of an issue, it does not justify the additional onus of an especially high standard of proof. As the *Chisolm* Court continued,

> "[I]t would be likewise a reproach to justice and our institutions, if a human being . . . were compelled to go to trial at a time when he is not sufficiently in possession of his mental faculties to enable him to make a rational and proper defense. The latter would be a more grievous error than the former; since in the one case an individual would go unwhipped of justice, while in the other the great safeguards which the law adopts in the punishment of crime and the upholding of justice would be rudely invaded by the tribunal whose sacred duty it is to uphold the law in all its integrity." 149 F., at 288.

A heightened standard does not decrease the risk of error, but simply reallocates that risk between the parties. See *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S., at 283. In cases in which competence is at issue, we perceive no sound basis for allocating to the criminal defendant the large share of the risk which accompanies a clear and convincing evidence standard. We assume that questions of competence will arise in a range of cases including not only those in which one side will prevail with relative ease, but also those in which it is more likely than not that the defendant is incompetent but the evidence is insufficiently strong to satisfy a clear and convincing standard. While important state interests are unquestionably at stake, in these latter cases the defendant's fundamental right to be tried only while competent outweighs the State's interest in the efficient operation of its criminal justice system.

---

[23] See also *People* v. *Lake*, 2 N. Y. 215, 220, 222 (1855); *State* v. *Harris*, 78 Am. Dec. 272, 274 (N. C. 1860); *State* v. *Tyler*, 7 Ohio N. P., at 444.

V

Oklahoma makes two additional arguments in support of its procedural rule that warrant discussion. First, Oklahoma correctly reminds us that it is normally within the power of the State to establish the procedures through which its laws are given effect, including those related to the burden of producing evidence and the burden of persuasion. See *Patterson* v. *New York*, 432 U. S., at 201–202. In *Patterson* we upheld New York's requirement that in a prosecution for second-degree murder the defendant must bear the burden of proving the affirmative defense of extreme emotional disturbance in order to reduce the crime to manslaughter. *Id.*, at 207–208. After observing that the rule was consistent with common-law practice, *id.*, at 202, we held that "[t]he Due Process Clause . . . does not put New York to the choice of abandoning [statutory] defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment," *id.*, at 207–208.

Although we found no violation in *Patterson*, we noted that the State's power to regulate procedural burdens was subject to proscription under the Due Process Clause if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *id.*, at 201–202 (internal quotation marks omitted). This case involves such a rule. Unlike *Patterson*, which concerned procedures for proving a statutory defense, we consider here whether a State's procedures for guaranteeing a fundamental constitutional right are sufficiently protective of that right. The deep roots and fundamental character of the defendant's right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel mandate constitutional protection.

Finally, Oklahoma suggests that our decision in *Addington* v. *Texas,* 441 U. S. 418 (1979), in which we held that due process requires a clear and convincing standard of proof in an involuntary civil commitment proceeding, supports imposition of such a rule in competency proceedings. The argument is unpersuasive because commitment and competency proceedings address entirely different substantive issues. Although we have not had the opportunity to consider the outer limits of a State's authority to civilly commit an unwilling individual, *O'Connor* v. *Donaldson,* 422 U. S. 563, 573–574 (1975), our decision in *Donaldson* makes clear that due process requires at a minimum a showing that the person is mentally ill and either poses a danger to himself or others or is incapable of "surviving safely in freedom," *id.,* at 573–576. The test for competence to stand trial, by contrast, is whether the defendant has the present ability to understand the charges against him and communicate effectively with defense counsel. *Dusky* v. *United States,* 362 U. S., at 402. Even if we were to uphold Oklahoma's imposition of the clear and convincing evidence rule in competency proceedings, the comparable standards in the two proceedings would not guarantee parallel results.[24]

More importantly, our decision today is in complete accord with the basis for our ruling in *Addington.* Both cases concern the proper protection of fundamental rights in circumstances in which the State proposes to take drastic action against an individual. The requirement that the grounds for civil commitment be shown by clear and convincing evidence protects the individual's fundamental interest in liberty. The *prohibition* against requiring the criminal defendant to demonstrate incompetence by clear and convincing evidence safeguards the fundamental right not to stand trial while incompetent. Because Oklahoma's procedural rule allows the State to put to trial a defendant who is more likely than not incompetent, the rule is incompatible with the dictates of due process.[25]

---

[24] For example, a mentally retarded defendant accused of a nonviolent crime may be found incompetent to stand trial but not necessarily be subject to involuntary civil commitment.

VI

For the foregoing reasons, the judgment is reversed, and the case is remanded to the Oklahoma Court of Criminal Appeals for further proceedings not inconsistent with this opinion.

It is so ordered.

---

[25] We note that *Addington* did not purport to resolve any question concerning the rights of the defendant in a criminal proceeding. To the contrary, in his opinion for the Court, Chief Justice Burger contrasted the appropriate standard in civil commitment proceedings with the rules applicable in criminal cases in which "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." 441 U. S., at 423.

MARKMAN ET AL. *v.* WESTVIEW INSTRUMENTS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 95–26. Argued January 8, 1996—Decided April 23, 1996

Petitioner Markman owns the patent to a system that tracks clothing through the dry-cleaning process using a keyboard and data processor to generate transaction records, including a bar code readable by optical detectors. According to the patent's claim, the portion of the patent document that defines the patentee's rights, Markman's product can "maintain an inventory total" and "detect and localize spurious additions to inventory." The product of respondent Westview Instruments, Inc., also uses a keyboard and processor and lists dry-cleaning charges on bar-coded tickets that can be read by optical detectors. In this infringement suit, after hearing an expert witness testify about the meaning of the claim's language, the jury found that Westview's product had infringed Markman's patent. The District Court nevertheless directed a verdict for Westview on the ground that its device is unable to track "inventory" as that term is used in the claim. The Court of Appeals affirmed, holding the interpretation of claim terms to be the exclusive province of the court and the Seventh Amendment to be consistent with that conclusion.

Held: The construction of a patent, including terms of art within its claim, is exclusively within the province of the court. Pp. 376–391.

(a) The Seventh Amendment right of trial by jury is the right which existed under the English common law when the Amendment was adopted. *Baltimore & Carolina Line, Inc.* v. *Redman,* 295 U. S. 654, 657. Thus, the Court asks, first, whether infringement cases either were tried at law at the time of the founding or are at least analogous to a cause of action that was. There is no dispute that infringement cases today must be tried before a jury, as their predecessors were more than two centuries ago. This conclusion raises a second question: whether the particular trial issue (here a patent claim's construction) is necessarily a jury issue. This question is answered by comparing the modern practice to historical sources. Where there is no exact antecedent in the common law, the modern practice should be compared to earlier practices whose allocation to court or jury is known, and the best analogy that can be drawn between an old and the new must be sought. Pp. 376–378.

(b) There is no direct antecedent of modern claim construction in the historical sources. The closest 18th-century analogue to modern claim construction seems to have been the construction of patent specifications describing the invention. Early patent cases from England and this Court show that judges, not juries, construed specification terms. No authority from this period supports Markman's contention that even if judges were charged with construing most patent terms, the art of defining terms of art in a specification fell within the jury's province. Pp. 378–384.

(c) Since evidence of common-law practice at the time of the framing does not entail application of the Seventh Amendment's jury guarantee to the construction of the claim document, this Court must look elsewhere to characterize this determination of meaning in order to allocate it as between judge or jury. Existing precedent, the relative interpretive skills of judges and juries, and statutory policy considerations all favor allocating construction issues to the court. As the former patent practitioner, Justice Curtis, explained, the first issue in a patent case, construing the patent, is a question of law, to be determined by the court. The second issue, whether infringement occurred, is a question of fact for a jury. *Winans* v. *Denmead,* 15 How. 330, 338. Contrary to Markman's contention, *Bischoff* v. *Wethered,* 9 Wall. 812, and *Tucker* v. *Spalding,* 13 Wall. 453, neither indicate that 19th-century juries resolved the meaning of patent terms of art nor undercut Justice Curtis's authority. Functional considerations also favor having judges define patent terms of art. A judge, from his training and discipline, is more likely to give proper interpretation to highly technical patents than a jury and is in a better position to ascertain whether an expert's proposed definition fully comports with the instrument as a whole. Finally, the need for uniformity in the treatment of a given patent favors allocation of construction issues to the court. Pp. 384–391.

52 F. 3d 967, affirmed.

SOUTER, J., delivered the opinion for a unanimous Court.

William B. Mallin argued the cause for petitioners. With him on the briefs were *Timothy P. Ryan, Timothy S. Coon, Lewis F. Gould, Jr.,* and *Stephan P. Gribok.*

Frank H. Griffin III argued the cause for respondents. With him on the brief were *Peter A. Vogt* and *Polly M. Shaffer.**

JUSTICE SOUTER delivered the opinion of the Court.

The question here is whether the interpretation of a so-called patent claim, the portion of the patent document that defines the scope of the patentee's rights, is a matter of law reserved entirely for the court, or subject to a Seventh Amendment guarantee that a jury will determine the meaning of any disputed term of art about which expert testimony is offered. We hold that the construction of a patent, including terms of art within its claim, is exclusively within the province of the court.

**Jeffrey Robert White, Pamela A. Liapakis,* and *Joseph W. Cotchett* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Intellectual Property Law Association by *Don W. Martens, Charles L. Gholz, R. Carl Moy, Roger W. Parkhurst, Joseph R. Re, Paul A. Stewart,* and *Harold C. Wegner;* for the Federal Circuit Bar Association by *David H. T. Kane* and *Rudolph P. Hofmann;* for the Dallas-Fort Worth Intellectual Property Law Association; for Honeywell, Inc., by *Richard G. Taranto* and *David L. Shapiro;* for Intellectual Property Owners by *Rex E. Lee, Carter G. Phillips, Mark E. Haddad,* and *Constantine L. Trela;* for Matsushita Electric Corp. of America et al. by *Morton Amster* and *Joel E. Lutzker;* for United States Surgical Corp. by *John G. Kester, J. Alan Galbraith, William E. McDaniels, Arthur R. Miller, Thomas R. Bremer,* and *John C. Andres;* for *John T. Roberts, pro se;* and for Douglas W. Wyatt by *Mr. Wyatt, pro se, Paul M. Janicke,* and *John R. Kirk, Jr.*

Briefs of *amici curiae* were filed for Airtouch Communications, Inc., by *Allan N. Littman* and *Robert P. Taylor;* for the American Automobile Manufacturers Association by *Charles W. Bradley, Stanley L. Amberg, Phillip D. Brady,* and *Andrew D. Koblenz;* for the American Board of Trial Advocates by *Robert G. Vial;* for Exxon Corp. et al. by *Donald B. Craven, Gerald Goldman, James P. Tuite,* and *James R. Lovelace;* and for Litton Systems, Inc., by *Laurence H. Tribe, Jonathan S. Massey,* and *Kenneth J. Chesebro.*

I

The Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, § 8, cl. 8. Congress first exercised this authority in 1790, when it provided for the issuance of "letters patent," Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, which, like their modern counterparts, granted inventors "the right to exclude others from making, using, offering for sale, selling, or importing the patented invention," in exchange for full disclosure of an invention, H. Schwartz, Patent Law and Practice 1, 33 (2d ed. 1995). It has long been understood that a patent must describe the exact scope of an invention and its manufacture to "secure to [the patentee] all to which he is entitled, [and] to apprise the public of what is still open to them." *McClain* v. *Ortmayer*, 141 U. S. 419, 424 (1891). Under the modern American system, these objectives are served by two distinct elements of a patent document. First, it contains a specification describing the invention "in such full, clear, concise, and exact terms as to enable any person skilled in the art . . . to make and use the same." 35 U. S. C. § 112; see also 3 E. Lipscomb, Walker on Patents § 10:1, pp. 183–184 (3d ed. 1985) (Lipscomb) (listing the requirements for a specification). Second, a patent includes one or more "claims," which "particularly poin[t] out and distinctly clai[m] the subject matter which the applicant regards as his invention." 35 U. S. C. § 112. "A claim covers and secures a process, a machine, a manufacture, a composition of matter, or a design, but never the function or result of either, nor the scientific explanation of their operation." 6 Lipscomb § 21:17, at 315–316. The claim "define[s] the scope of a patent grant," 3 *id.*, § 11:1, at 280, and functions to forbid not only exact copies of an invention, but products that go to "the heart of an invention but avoids the literal language of the claim by making a noncritical change," Schwartz, *supra*, at 82.[1] In this opinion, the word "claim" is used only in this sense peculiar to patent law.

Characteristically, patent lawsuits charge what is known as infringement, Schwartz, *supra*, at 75, and rest on allegations that the defendant "without authority ma[de], use[d] or [sold the] patented invention, within the United States during the term of the patent therefor . . . ." 35 U. S. C. § 271(a). Victory in an infringement suit requires a finding that the patent claim "covers the alleged infringer's product or process," which in turn necessitates a determination of "what the words in the claim mean." Schwartz, *supra*, at 80; see also 3 Lipscomb § 11:2, at 288–290.

Petitioner in this infringement suit, Markman, owns United States Reissue Patent No. 33,054 for his "Inventory Control and Reporting System for Drycleaning Stores." The patent describes a system that can monitor and report the status, location, and movement of clothing in a dry-cleaning establishment. The Markman system consists of a keyboard and data processor to generate written records for each transaction, including a bar code readable by optical detectors operated by employees, who log the progress of clothing through the dry-cleaning process. Respondent Westview's product also includes a keyboard and processor, and it lists charges for the dry-cleaning services on bar-coded tickets that can be read by portable optical detectors.

Markman brought an infringement suit against Westview and Althon Enterprises, an operator of dry-cleaning establishments using Westview's products (collectively, Westview). Westview responded that Markman's patent is not infringed by its system because the latter functions merely to record an inventory of receivables by tracking invoices and transaction totals, rather than to record and track an inventory of articles of clothing. Part of the dispute hinged upon the meaning of the word "inventory," a term found in Markman's independent claim 1, which states that Markman's product can "maintain an inventory total" and "detect and localize spurious additions to inventory." The case was tried before a jury, which heard, among others, a witness produced by Markman who testified about the meaning of the claim language.

---

[1] Thus, for example, a claim for a ceiling fan with three blades attached to a solid rod connected to a motor would not only cover fans that take precisely this form, but would also cover a similar fan that includes some additional feature, *e. g.*, such a fan with a cord or switch for turning it on and off, and may cover a product deviating from the core design in some noncritical way, *e. g.*, a three-bladed ceiling fan with blades attached to a hollow rod connected to a motor. H. Schwartz, Patent Law and Practice 81–82 (2d ed. 1995).

After the jury compared the patent to Westview's device, it found an infringement of Markman's independent claim 1 and dependent claim 10.[2] The District Court nevertheless granted Westview's deferred motion for judgment as a matter of law, one of its reasons being that the term "inventory" in Markman's patent encompasses "both cash inventory and the actual physical inventory of articles of clothing." 772 F. Supp. 1535, 1537–1538 (ED Pa. 1991). Under the trial court's construction of the patent, the production, sale, or use of a tracking system for dry cleaners would not infringe Markman's patent unless the product was capable of tracking articles of clothing throughout the cleaning process and generating reports about their status and location. Since Westview's system cannot do these things, the District Court directed a verdict on the ground that Westview's device does not have the "means to maintain an inventory total" and thus cannot " 'detect and localize spurious additions to inventory as well as spurious deletions therefrom,' " as required by claim 1. *Id.*, at 1537.

---

[2] Dependent claim 10 specifies that, in the invention of claim 1, the input device is an alpha-numeric keyboard in which single keys may be used to enter the attributes of the items in question.

Markman appealed, arguing it was error for the District Court to substitute its construction of the disputed claim term 'inventory' for the construction the jury had presumably given it. The United States Court of Appeals for the Federal Circuit affirmed, holding the interpretation of claim terms to be the exclusive province of the court and the Seventh Amendment to be consistent with that conclusion. 52 F. 3d 967 (1995). Markman sought our review on each point, and we granted certiorari. 515 U. S. 1192 (1995). We now affirm.

II

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U. S. Const., Amdt. 7. Since Justice Story's day, *United States* v. *Wonson,* 28 F. Cas. 745, 750 (No. 16,750) (CC Mass. 1812), we have understood that "[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted." *Baltimore & Carolina Line, Inc.* v. *Redman,* 295 U. S. 654, 657 (1935). In keeping with our longstanding adherence to this "historical test," Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 640–643 (1973), we ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was, see, *e. g., Tull* v. *United States,* 481 U. S. 412, 417 (1987). If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. See *infra,* at 377–378.[3]

---

[3] Our formulations of the historical test do not deal with the possibility of conflict between actual English common-law practice and American assumptions about what that practice was, or between English and American practices at the relevant time. No such complications arise in this case.

A

As to the first issue, going to the character of the cause of action, "[t]he form of our analysis is familiar. 'First we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity.'" *Granfinanciera, S. A.* v. *Nordberg,* 492 U. S. 33, 42 (1989) (citation omitted). Equally familiar is the descent of today's patent infringement action from the infringement actions tried at law in the 18th century, and there is no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago. See, *e. g., Bramah* v. *Hardcastle,* 1 Carp. P. C. 168 (K. B. 1789).

B

This conclusion raises the second question, whether a particular issue occurring within a jury trial (here the construction of a patent claim) is itself necessarily a jury issue, the guarantee being essential to preserve the right to a jury's resolution of the ultimate dispute. In some instances the answer to this second question may be easy because of clear historical evidence that the very subsidiary question was so regarded under the English practice of leaving the issue for a jury. But when, as here, the old practice provides no clear answer, see *infra,* at 378–380, we are forced to make a judgment about the scope of the Seventh Amendment guarantee without the benefit of any foolproof test.

The Court has repeatedly said that the answer to the second question "must depend on whether the jury must shoulder this responsibility *as necessary to preserve the 'substance of the common-law right of trial by jury.'*" *Tull* v. *United States, supra,* at 426 (emphasis added) (quoting *Colgrove* v. *Battin,* 413 U. S. 149, 157 (1973)); see also *Baltimore & Carolina Line, supra,* at 657. "'"Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature."'" *Tull* v. *United States, supra,* at 426 (citations omitted); see also *Galloway* v. *United States,* 319 U. S. 372, 392 (1943).

The "substance of the common-law right" is, however, a pretty blunt instrument for drawing distinctions. We have tried to sharpen it, to be sure, by reference to the distinction between substance and procedure. See *Baltimore & Carolina Line, supra,* at 657; see also *Galloway* v. *United States, supra,* at 390–391; *Ex parte Peterson,* 253 U. S. 300, 309 (1920); *Walker* v. *New Mexico & Southern Pacific R. Co.,* 165 U. S. 593, 596 (1897); but see *Sun Oil Co.* v. *Wortman,* 486 U. S. 717, 727 (1988). We have also spoken of the line as one between issues of fact and law. See *Baltimore & Carolina Line, supra,* at 657; see also *Ex parte Peterson, supra,* at 310; *Walker* v. *New Mexico & Southern Pacific R. Co., supra,* at 597; but see *Pullman-Standard* v. *Swint,* 456 U. S. 273, 288 (1982).

But the sounder course, when available, is to classify a mongrel practice (like construing a term of art following receipt of evidence) by using the historical method, much as we do in characterizing the suits and actions within which they arise. Where there is no exact antecedent, the best hope lies in comparing the modern practice to earlier ones whose allocation to court or jury we do know, cf. *Baltimore & Carolina Line, supra,* at 659, 660; *Dimick* v. *Schiedt,* 293 U. S. 474, 477, 482 (1935), seeking the best analogy we can draw between an old and the new, see *Tull* v. *United States, supra,* at 420–421 (we must search the English common law for "appropriate analogies" rather than a "precisely analogous common-law cause of action").

C

"Prior to 1790 nothing in the nature of a claim had appeared either in British patent practice or in that of the

American states," Lutz, Evolution of the Claims of U. S. Patents, 20 J. Pat. Off. Soc. 134 (1938), and we have accordingly found no direct antecedent of modern claim construction in the historical sources. Claim practice did not achieve statutory recognition until the passage of the Act of July 4, 1836, ch. 357, § 6, 5 Stat. 119, and inclusion of a claim did not become a statutory requirement until 1870, Act of July 8, 1870, ch. 230, § 26, 16 Stat. 201; see 1 A. Deller, Patent Claims § 4, p. 9 (2d ed. 1971). Although, as one historian has observed, as early as 1850 "judges were . . . beginning to express more frequently the idea that in seeking to ascertain the invention 'claimed' in a patent the inquiry should be limited to interpreting the summary, or 'claim,'" Lutz, *supra*, at 145, "[t]he idea that the claim is just as important if not more important than the description and drawings did not develop until the Act of 1870 or thereabouts." Deller, *supra*, § 4, at 9.

At the time relevant for Seventh Amendment analogies, in contrast, it was the specification, itself a relatively new development, H. Dutton, The Patent System and Inventive Activity During the Industrial Revolution, 1750–1852, pp. 75–76 (1984), that represented the key to the patent. Thus, patent litigation in that early period was typified by so-called novelty actions, testing whether "any essential part of [the patent had been] disclosed to the public before," *Huddart* v. *Grimshaw*, Dav. Pat. Cas. 265, 298 (K. B. 1803), and "enablement" cases, in which juries were asked to determine whether the specification described the invention well enough to allow members of the appropriate trade to reproduce it, see, *e. g.*, *Arkwright* v. *Nightingale*, Dav. Pat. Cas. 37, 60 (C. P. 1785).

The closest 18th-century analogue of modern claim construction seems, then, to have been the construction of specifications, and as to that function the mere smattering of patent cases that we have from this period[4] shows no established jury practice sufficient to support an argument by analogy that today's construction of a claim should be a guaranteed jury issue. Few of the case reports even touch upon the proper interpretation of disputed terms in the specifications at issue, see, *e. g.*, *Bramah* v. *Hardcastle*, 1 Carp. P. C. 168 (K. B. 1789); *King* v. *Else*, 1 Carp. P. C. 103, Dav. Pat. Cas. 144 (K. B. 1785); *Dollond's Case*, 1 Carp. P. C. 28 (C. P. 1758); *Administrators of Calthorp* v. *Waymans*, 3 Keb. 710, 84 Eng. Rep. 966 (K. B. 1676), and none demonstrates that the definition of such a term was determined by the jury.[5] This absence of an established practice should not surprise us, given the primitive state of jury patent practice at the end of the 18th century, when juries were still new to the field. Although by 1791 more than a century had passed since the enactment of the Statute of Monopolies, which provided that the validity of any monopoly should be determined in accordance with the common law, patent litigation had remained within the jurisdiction of the Privy Council until 1752 and hence without the option of a jury trial. E. Walterscheid, Early Evolution of the United States Patent Law: Antecedents (Part 3), 77 J. Pat. & Tm. Off. Soc. 771, 771–776 (1995). Indeed, the state of patent law in the common-law courts before 1800 led one historian to observe that "the reported cases are destitute of any decision of importance . . . . At the end of the eighteenth century, therefore, the Common Law Judges were left to pick up the threads of the principles of law without the aid of recent and reliable precedents." Hulme, On the Consideration of the Patent Grant, Past and Present, 13 L. Q. Rev. 313, 318 (1897). Earlier writers expressed similar discouragement at patent law's amorphous character,[6] and, as late as the 1830's, English commentators were irked by enduring confusion in the field. See Dutton, *supra*, at 69–70.

---

[4] Before the turn of the century, "no more than twenty-two [reported] cases came before the superior courts of London." H. Dutton, The Patent System and Inventive Activity During the Industrial Revolution, 1750–1852, p. 71 (1984).

[5] Markman relies heavily upon Justice Buller's notes of Lord Mansfield's instructions in *Liardet* v. *Johnson* (K. B. 1778), in 1 J. Oldham, The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century 748 (1992). *Liardet* was an enablement case about the invention of stucco, in which a defendant asserted that the patent was invalid because it did not fully describe the appropriate method for producing the substance. Even setting aside concerns about the accuracy of the summary of the jury instructions provided for this case from outside the established reports, see 1 Oldham, *supra*, at 752, n. 11, it does not show that juries construed disputed terms in a patent. From its ambiguous references, *e. g.*, 1 Oldham, *supra*, at 756 ("[Lord Mansfield] left to the jury 1st, on all objections made to exactness, certainty and propriety of the Specification, & whether any workman could make it by [the Specification]"), we cannot infer the existence of an established practice, cf. *Galloway* v. *United States*, 319 U. S. 372, 392 (1943) (expressing concern regarding the "uncertainty and the variety of conclusions which follows from an effort at purely historical accuracy"), especially when, as here, the inference is undermined by evidence that judges, rather than jurors, ordinarily construed written documents at the time. See *infra*, at 381–383.

Markman seeks to supply what the early case reports lack in so many words by relying on decisions like *Turner* v. *Winter*, 1 T. R. 602, 99 Eng. Rep. 1274 (K. B. 1787), and *Arkwright* v. *Nightingale*, Dav. Pat. Cas. 37 (C. P. 1785), to argue that the 18th-century juries must have acted as definers of patent terms just to reach the verdicts we know they rendered in patent cases turning on enablement or novelty. But the conclusion simply does not follow. There is no more reason to infer that juries supplied plenary interpretation of written instruments in patent litigation than in other cases implicating the meaning of documentary terms, and we do know that in other kinds of cases during this period judges, not juries, ordinarily construed written documents.[7] The probability that the judges were doing the same thing in the patent litigation of the time is confirmed by the fact that as soon as the English reports did begin to describe the construction of patent documents, they show the judges construing the terms of the specifications. See *Bovill* v. *Moore*, Dav. Pat. Cas. 361, 399, 404 (C. P. 1816) (judge submits question of novelty to the jury only after explaining some of the language and "stat[ing] in what terms the specification runs"); cf. *Russell* v. *Cowley & Dixon*, Webs. Pat. Cas. 457, 467–470 (Exch. 1834) (construing the terms of the specification in reviewing a verdict); *Haworth* v. *Hardcastle*, Webs. Pat. Cas. 480, 484–485 (1834) (same). This evidence is in fact buttressed by cases from this Court; when they first reveal actual practice, the practice revealed is of the judge construing the patent. See, *e. g.*, *Winans* v. *New York & Erie R. Co.*, 21 How. 88, 100 (1859); *Winans* v. *Denmead*, 15 How. 330, 338 (1854); *Hogg* v. *Emerson*, 6 How. 437, 484 (1848); cf. *Parker* v. *Hulme*, 18 F. Cas. 1138 (No. 10,740) (CC ED Pa. 1849). These indications of our patent practice are the more impressive for being all of a piece with what we know about the analogous contemporary practice of interpreting terms within a land patent, where it fell to the judge, not the jury, to construe the words.[8]

---

[6] See, *e. g.*, *Boulton and Watt* v. *Bull*, 2 H. Bl. 463, 491, 126 Eng. Rep. 651, 665 (C. P. 1795) (Eyre, C. J.) ("Patent rights are no where that I can find accurately discussed in our books"); Dutton, *supra* n. 4, at 70–71 (quoting Abraham Weston as saying "it may with truth be said that the [Law] Books are silent on the subject [of patents] and furnish no clue to go by, in agitating the Question What is the Law of Patents?").

---

[7] See, *e. g.*, Devlin, Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment, 80 Colum. L. Rev. 43, 75 (1980); Weiner, The Civil Jury Trial and the Law-Fact Distinction, 54 Calif. L. Rev. 1867, 1932 (1966). For example, one historian observed that it was generally the practice of judges in the late 18th century "to keep the construction of writings *out of the jury's hands* and reserve it for themselves," a "safeguard" designed to prevent a jury from "constru[ing] or refin[ing] it at pleasure." 9 J. Wigmore, Evidence §2461, p. 194 (J. Chadbourn rev. ed. 1981) (emphasis in original; internal quotation marks omitted). The absence of any established practice supporting Markman's view is also shown by the disagreement between Justices Willis and Buller, reported in *Macbeath* v. *Haldimand*, 1 T. R. 173, 180–182, 99 Eng. Rep. 1036, 1040–1041 (K. B. 1786), as to whether juries could ever construe written documents when their meaning was disputed.

D

Losing, then, on the contention that juries generally had interpretive responsibilities during the 18th century, Markman seeks a different anchor for analogy in the more modest contention that even if judges were charged with construing most terms in the patent, the art of defining terms of art employed in a specification fell within the province of the jury. Again, however, Markman has no authority from the period in question, but relies instead on the later case of *Neilson* v. *Harford,* Webs. Pat. Cas. 328 (Exch. 1841). There, an exchange between the judge and the lawyers indicated that although the construction of a patent was ordinarily for the court, *id.,* at 349 (Alderson, B.), judges should "leav[e] the question of words of art to the jury," *id.,* at 350 (Alderson, B.); see also *id.,* at 370 (judgment of the court); *Hill* v. *Evans,* 4 De. G. F. & J. 288, 293–294, 45 Eng. Rep. 1195, 1197 (Ch. 1862). Without, however, in any way disparaging the weight to which Baron Alderson's view is entitled, the most we can say is that an English report more than 70 years after the time that concerns us indicates an exception to what probably had been occurring earlier.[9] In place of

---

[8] As we noted in *Brown* v. *Huger,* 21 How. 305, 318 (1859):

"With regard to the second part of this objection, that which claims for the jury the construction of the patent, we remark that the patent itself must be taken as evidence of its meaning; that, like other written instruments, it must be interpreted as a whole . . . and the legal deductions drawn therefrom must be conformable with the scope and purpose of the entire document. This construction and these deductions we hold to be within the exclusive province of the court."

[9] In explaining that judges generally construed all terms in a written document at the end of the 18th century, one historian observed that "[i]nterpretation by local usage for example (today the plainest case of legitimate deviation from the normal standard) was still but making its way." 9 Wigmore, Evidence §2461, at 195; see also *id.,* at 195, and n. 6 (providing examples of this practice). We need not in any event consider here

Markman's inference that this exceptional practice existed in 1791 there is at best only a possibility that it did, and for anything more than a possibility we have found no scholarly authority.

III

Since evidence of common-law practice at the time of the framing does not entail application of the Seventh Amendment's jury guarantee to the construction of the claim document, we must look elsewhere to characterize this determination of meaning in order to allocate it as between court or jury. We accordingly consult existing precedent[10] and consider both the relative interpretive skills of judges and juries and the statutory policies that ought to be furthered by the allocation.

A

The two elements of a simple patent case, construing the patent and determining whether infringement occurred, were characterized by the former patent practitioner, Justice Curtis.[11] "The first is a question of law, to be determined by the court, construing the letters-patent, and the description of the invention and specification of claim annexed to them. The second is a question of fact, to be submitted to a jury." *Winans* v. *Denmead, supra,* at 338; see *Winans* v.

---

whether our conclusion that the Seventh Amendment does not require terms of art in patent claims to be submitted to the jury supports a similar result in other types of cases.

[10] Because we conclude that our precedent supports classifying the question as one for the court, we need not decide either the extent to which the Seventh Amendment can be said to have crystallized a law/fact distinction, cf. *Ex parte Peterson,* 253 U. S. 300, 310 (1920); *Walker* v. *New Mexico & Southern Pacific R. Co.,* 165 U. S. 593, 597 (1897), or whether post-1791 precedent classifying an issue as one of fact would trigger the protections of the Seventh Amendment if (unlike this case) there were no more specific reason for decision.

[11] See 1 A Memoir of Benjamin Robbins Curtis, L. L. D., 84 (B. Curtis ed. 1879); cf. *O'Reilly* v. *Morse,* 15 How. 62, 63 (1854) (noting his involvement in a patent case).

New York & Erie R. Co., supra, at 100; *Hogg* v. *Emerson, supra,* at 484; cf. *Parker* v. *Hulme, supra,* at 1140.

In arguing for a different allocation of responsibility for the first question, Markman relies primarily on two cases, *Bischoff* v. *Wethered,* 9 Wall. 812 (1870), and *Tucker* v. *Spalding,* 13 Wall. 453 (1872). These are said to show that evidence of the meaning of patent terms was offered to 19th-century juries, and thus to imply that the meaning of a documentary term was a jury issue whenever it was subject to evidentiary proof. That is not what Markman's cases show, however.

In order to resolve the *Bischoff* suit implicating the construction of rival patents, we considered "whether the court below was bound to compare the two specifications, and to instruct the jury, as a matter of law, whether the inventions therein described were, or were not, identical." 9 Wall., at 813 (statement of the case). We said it was not bound to do that, on the ground that investing the court with so dispositive a role would improperly eliminate the jury's function in answering the ultimate question of infringement. On that ultimate issue, expert testimony had been admitted on "the nature of the various mechanisms or manufactures described in the different patents produced, and as to the identity or diversity between them." *Id.,* at 814. Although the jury's consideration of that expert testimony in resolving the question of infringement was said to impinge upon the well-established principle "that it is the province of the court, and not the jury, to construe the meaning of documentary evidence," *id.,* at 815, we decided that it was not so. We said:

> "[T]he specifications . . . profess to describe mechanisms and complicated machinery, chemical compositions and other manufactured products, which have their existence *in pais,* outside of the documents themselves; and which are commonly described by terms of the art or mystery to which they respectively belong; and these

> descriptions and terms of art often require peculiar knowledge and education to understand them aright.... Indeed, the whole subject-matter of a patent is an embodied conception outside of the patent itself.... This outward embodiment of the terms contained in the patent is the thing invented, and is to be properly sought, like the explanation of all latent ambiguities arising from the description of external things, by evidence *in pais.*" *Ibid.*

Bischoff does not then, as Markman contends, hold that the use of expert testimony about the meaning of terms of art requires the judge to submit the question of their construction to the jury. It is instead a case in which the Court drew a line between issues of document interpretation and product identification, and held that expert testimony was properly presented to the jury on the latter, ultimate issue, whether the physical objects produced by the patent were identical. The Court did not see the decision as bearing upon the appropriate treatment of disputed terms. As the opinion emphasized, the Court's "view of the case is not intended to, and does not, trench upon the doctrine that the construction of written instruments is the province of the court alone. *It is not the construction of the instrument, but the character of the thing invented, which is sought in questions of identity and diversity of inventions.*" *Id.*, at 816 (emphasis added). *Tucker*, the second case proffered by Markman, is to the same effect. Its reasoning rested expressly on *Bischoff*, and it just as clearly noted that in addressing the ultimate issue of mixed fact and law, it was for the court to "lay down to the jury the law which should govern them." *Tucker, supra*, at 455.[12]

---

[12] We are also unpersuaded by petitioner's heavy reliance upon the decision of Justice Story on circuit in *Washburn* v. *Gould*, 29 F. Cas. 312 (No. 17,214) (CC Mass. 1844). Although he wrote that "[t]he jury are to judge of the meaning of words of art, and technical phrases," *id.*, at 325, he did so in describing the decision in *Neilson* v. *Harford*, Webs. Pat. Cas. 328

If the line drawn in these two opinions is a fine one, it is one that the Court has drawn repeatedly in explaining the respective roles of the jury and judge in patent cases,[13] and one understood by commentators writing in the aftermath of the cases Markman cites. Walker, for example, read *Bischoff* as holding that the question of novelty is not decided by a construction of the prior patent, "but depends rather upon the outward embodiment of the terms contained in the [prior patent]; and that such outward embodiment is to be properly sought, like the explanation of latent ambiguities arising from the description of external things, by evidence *in pais*." A. Walker, Patent Laws § 75, p. 68 (3d ed. 1895). He also emphasized in the same treatise that matters of claim construction, even those aided by expert testimony, are questions for the court:

> "Questions of construction are questions of law for the judge, not questions of fact for the jury. As it cannot be expected, however, that judges will always possess the requisite knowledge of the meaning of the terms of art or science used in letters patent, it often becomes necessary that they should avail themselves of the light furnished by experts relevant to the significance of such words and phrases. The judges are not, however, obliged to blindly follow such testimony." *Id.*, § 189, at 173 (footnotes omitted).

Virtually the same description of the court's use of evidence in its interpretive role was set out in another contemporary treatise:

(Exch. 1841), which we discuss, *supra*, at 383, and, whether or not he agreed with *Neilson*, he stated, "[b]ut I do not proceed upon this ground." 29 F. Cas., at 325.

[13] See, *e. g.*, *Coupe* v. *Royer*, 155 U. S. 565, 579–580 (1895); *Silsby* v. *Foote*, 14 How. 218, 226 (1853); *Hogg* v. *Emerson*, 6 How. 437, 484 (1848); cf. *Brown* v. *Piper*, 91 U. S. 37, 41 (1875); *Winans* v. *New York & Erie R. Co.*, 21 How. 88, 100 (1859); cf. also *U. S. Industrial Chemicals, Inc.* v. *Carbide & Carbon Chemicals Corp.*, 315 U. S. 668, 678 (1942).

> "The duty of interpreting letters-patent has been committed to the courts. A patent is a legal instrument, to be construed, like other legal instruments, according to its tenor. . . . Where technical terms are used, or where the qualities of substances or operations mentioned or any similar data necessary to the comprehension of the language of the patent are unknown to the judge, the testimony of witnesses may be received upon these subjects, and any other means of information be employed. *But in the actual interpretation of the patent the court proceeds upon its own responsibility, as an arbiter of the law, giving to the patent its true and final character and force.*" 2 W. Robinson, Law of Patents § 732, pp. 481–483 (1890) (emphasis added; footnotes omitted).

In sum, neither *Bischoff* nor *Tucker* indicates that juries resolved the meaning of terms of art in construing a patent, and neither case undercuts Justice Curtis's authority.

B

Where history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury to define terms of art. We said in *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985), that when an issue "falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." So it turns out here, for judges, not juries, are the better suited to find the acquired meaning of patent terms.

The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis. Patent construction in particular "is a special occupation, requiring, like all others, special training and practice. The judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be." *Parker* v. *Hulme*, 18 F. Cas., at 1140. Such was the understanding nearly a century and a half ago, and there is no reason to weigh the respective strengths of judge and jury differently in relation to the modern claim; quite the contrary, for "the claims of patents have become highly technical in many respects as the result of special doctrines relating to the proper form and scope of claims that have been developed by the courts and the Patent Office." Woodward, Definiteness and Particularity in Patent Claims, 46 Mich. L. Rev. 755, 765 (1948).

Markman would trump these considerations with his argument that a jury should decide a question of meaning peculiar to a trade or profession simply because the question is a subject of testimony requiring credibility determinations, which are the jury's forte. It is, of course, true that credibility judgments have to be made about the experts who testify in patent cases, and in theory there could be a case in which a simple credibility judgment would suffice to choose between experts whose testimony was equally consistent with a patent's internal logic. But our own experience with document construction leaves us doubtful that trial courts will run into many cases like that. In the main, we expect, any credibility determinations will be subsumed within the necessarily sophisticated analysis of the whole document, required by the standard construction rule that a term can be defined only in a way that comports with the instrument as a whole. See *Bates* v. *Coe*, 98 U. S. 31, 38 (1878); 6 Lipscomb §21:40, at 393; 2 Robinson, *supra*, §734, at 484; Woodward, *supra*, at 765; cf. *U. S. Industrial Chemicals, Inc.* v. *Carbide & Carbon Chemicals Co.*, 315 U. S. 668, 678 (1942); cf. 6 Lipscomb §21:40, at 393. Thus, in these cases a jury's capabilities to evaluate demeanor, cf. *Miller*, *supra*, at 114, 117, to sense the "mainsprings of human conduct," *Commissioner* v. *Duberstein*, 363 U. S. 278, 289 (1960), or to reflect community standards, *United States* v. *McConney*, 728 F. 2d 1195, 1204 (CA9 1984) (en banc), are much less significant than a trained ability to evaluate the testimony in relation to the overall structure of the patent. The decisionmaker vested with the task of construing the patent is in the better position to ascertain whether an expert's proposed definition fully comports with the specification and claims and so will preserve the patent's internal coherence. We accordingly think there is sufficient reason to treat construction of terms of art like many other responsibilities that we cede to a judge in the normal course of trial, notwithstanding its evidentiary underpinnings.

C

Finally, we see the importance of uniformity in the treatment of a given patent as an independent reason to allocate all issues of construction to the court. As we noted in *General Elec. Co.* v. *Wabash Appliance Corp.*, 304 U. S. 364, 369 (1938), "[t]he limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public." Otherwise, a "zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims would discourage invention only a little less than unequivocal foreclosure of the field," *United Carbon Co.* v. *Binney & Smith Co.*, 317 U. S. 228, 236 (1942), and "[t]he public [would] be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights." *Merrill* v. *Yeomans*, 94 U. S. 568, 573 (1877). It was just for the sake of such desirable uniformity that Congress created the Court of Appeals for the Federal Circuit as an exclusive appellate court for patent cases, H. R. Rep. No. 97–312, pp. 20–23 (1981), observing that increased uniformity would "strengthen the United States patent system in such a way as to foster technological growth and industrial innovation." *Id.*, at 20.

Uniformity would, however, be ill served by submitting issues of document construction to juries. Making them jury issues would not, to be sure, necessarily leave evidentiary questions of meaning wide open in every new court in which a patent might be litigated, for principles of issue preclusion would ordinarily foster uniformity. Cf. *Blonder-Tongue Laboratories, Inc.* v. *University of Ill. Foundation,* 402 U. S. 313 (1971). But whereas issue preclusion could not be asserted against new and independent infringement defendants even within a given jurisdiction, treating interpretive issues as purely legal will promote (though it will not guarantee) intrajurisdictional certainty through the application of *stare decisis* on those questions not yet subject to interjurisdictional uniformity under the authority of the single appeals court.

* * *

Accordingly, we hold that the interpretation of the word "inventory" in this case is an issue for the judge, not the jury, and affirm the decision of the Court of Appeals for the Federal Circuit.

It is so ordered.

HOLLY FARMS CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95–210. Argued February 21, 1996—Decided April 23, 1996

Respondent National Labor Relations Board (Board) approved a bargaining unit at the Wilkesboro, North Carolina, processing plant of petitioner Holly Farms Corporation, a vertically integrated poultry producer. The approved unit included workers described as "live-haul" crews—teams of chicken catchers, forklift operators, and truckdrivers, who collect for slaughter chickens raised as broilers by independent contract growers, and transport the birds to the processing plant. On Holly Farms' petition for review, the Fourth Circuit enforced the Board's order. The court held that the Board's classification of the live-haul workers as "employee[s]" protected by the National Labor Relations Act (NLRA or Act), rather than "agricultural laborer[s]" excluded from the Act's coverage by § 2(3) of the NLRA, rested on a reasonable interpretation of the Act and was consistent with the Board's prior decisions and with the Eighth Circuit's case law.

Held: The Board reasonably aligned the live-haul crews with Holly Farms' processing operations, typing them covered "employee[s]," not exempt "agricultural laborer[s]"; therefore, the Fourth Circuit properly deferred to the Board's determination. Pp. 397–409.

(a) The term "agricultural laborer," as used in § 2(3) of the NLRA, derives its meaning from the definition of "agriculture" supplied by § 3(f) of the Fair Labor Standards Act of 1938 (FLSA). This definition includes farming in both a primary sense, which includes "the raising . . . of poultry," and a secondary sense, which encompasses practices "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." When a statutory prescription is not free from ambiguity, the Board must choose between conflicting reasonable interpretations. Courts, in turn, must respect the judgment of the agency empowered to apply the law to varying fact patterns. *Bayside Enterprises, Inc.* v. *NLRB*, 429 U. S. 298, 304. Pp. 397–399.

(b) The Court confronts no contention that the live-haul crews are engaged in primary agriculture. Thus, the sole question the Court addresses and decides is whether the chicken catchers, forklift operators, and truckdrivers are engaged in *secondary* agriculture. The live-haul activities are not "performed by a farmer." When an integrated poultry producer contracts with independent growers for the care and feeding of chicks hatched in the producer's hatcheries, the producer's status as a farmer ends with respect to those chicks. *Bayside*, 429 U. S., at 302, n. 9. The producer does not resume farmer status when its live-haul employees arrive on the independent farms to collect broilers for carriage to slaughter and processing. This conclusion entirely disposes of the contention that the truckdrivers are employed in secondary agriculture, for Holly Farms acknowledges that these crew members do not work "on a farm." Pp. 399–401.

(c) The more substantial question is whether the catching and loading of broilers qualifies as work performed "on a farm as an incident to or in conjunction with" the independent growers' farming operations. Holly Farms' position that this work is incident to the raising of poultry is a plausible, but not an inevitable, construction of FLSA § 3(f). Hence, a reviewing court must examine the Board's position only for its reasonableness as an interpretation of the governing legislation. P. 401.

(d) The Board concluded that the collection of broilers for slaughter, although performed "on a farm," is not incidental to farming operations. Rather, the Board determined, the live-haul crews' work is tied to Holly Farms' processing operations. This is a reasonable interpretation of the statute. Once the broilers have grown on the farm for seven weeks, the growers' contractual obligation to raise the birds ends, and the work of the live-haul crew begins. The growers do not assist the crews in catching or loading the chickens, and the crews play no role in the growers' performance of their contractual undertakings. Furthermore, the live-haul employees all work out of the Wilkesboro processing plant, begin and end each shift by punching a timeclock at the plant, and are functionally integrated with other processing-plant employees. It was also sensible for the Board to home in on the status of the crews' *employer*. Pp. 401–404.

(e) The Board's decision adheres to longstanding NLRB precedent, see, *e. g., Imco Poultry, Div. of Int'l Multifoods Corp.*, 202 N. L. R. B. 259, 260, and is supported by the construction of FLSA § 3(f) by the Department of Labor, the agency responsible for administering the FLSA. The Department's interpretative regulations accord with the Board's conclusion that the live-haul crews do not engage in secondary farming and further demonstrate that FLSA § 3(f)'s meaning is not so plain as to bear only one permissible construction in the context at hand. Pp. 405–408.

48 F. 3d 1360, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, and BREYER, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post,* p. 409.

Charles P. Roberts III argued the cause and filed briefs for petitioners.

Richard H. Seamon argued the cause for respondents. With him on the brief for respondent National Labor Relations Board were *Solicitor General Days, Deputy Solicitor General Wallace, Linda Sher, Norton J. Come,* and *John Emad Arbab. J. David James, Judith A. Scott, Jon Hiatt, Andrew D. Roth,* and *Laurence Gold* filed a brief for respondent unions.*

JUSTICE GINSBURG delivered the opinion of the Court.

This controversy stems from a dispute concerning union representation at the Wilkesboro, North Carolina, headquarters facility of Holly Farms, a corporation engaged in the production, processing, and marketing of poultry products. The parties divide, as have federal courts, over the classification of certain workers, described as "live-haul" crews—teams of chicken catchers, forklift operators, and truckdrivers, who collect for slaughter chickens raised as broilers by independent contract growers, and transport the birds to Holly Farms' processing plant. Holly Farms maintains that members of "live-haul" crews are "agricultural laborer[s]," a category of workers exempt from National Labor Relations Act coverage. The National Labor Relations Board disagreed and approved a Wilkesboro plant bargaining unit including those employees. Satisfied that the Board reasonably aligned the "live-haul" crews with the corporation's

---

*Briefs of *amici curiae* urging reversal were filed for the American Farm Bureau Federation et al. by *Robert P. Davis, John J. Rademacher, Michael F. Rosenblum,* and *Timothy S. Bishop;* and for the National Broiler Council by *Gary Jay Kushner, John G. Roberts, Jr.,* and *Jonathan S. Franklin.*

Joseph A. Wender, Jr., filed a brief for the California Agricultural Labor Relations Board as *amicus curiae.*

processing operations, typing them covered "employee[s]," not exempt "agricultural laborer[s]," we affirm the Court of Appeals' judgment, which properly deferred to the Board's determination.

I

A

Petitioner Holly Farms Corporation, a wholly owned subsidiary of Tyson Foods, Inc., is a vertically integrated poultry producer headquartered in Wilkesboro, North Carolina.[1] Holly Farms' activities encompass numerous poultry operations, including hatcheries, a feed mill, an equipment maintenance center, and a processing plant.

"Broiler" chickens are birds destined for human food markets.[2] Holly Farms hatches broiler chicks at its own hatcheries, and immediately delivers the chicks to the farms of independent contractors. The contractors then raise the birds into full-grown broiler chickens. Holly Farms pays the contract growers for their services, but retains title to the broilers and supplies the food and medicine necessary to their growth.

When the broilers are seven weeks old, Holly Farms sends its live-haul crews to reclaim the birds and ferry them to the processing plant for slaughter. The live-haul crews—which typically comprise nine chicken catchers, one forklift operator, and one live-haul driver—travel in a flat-bed truck from Holly Farms' processing plant to the farms of the independent growers. At the farms, the chicken catchers enter the coops, manually capture the broilers, and load them into cages. The forklift operator lifts the caged chickens onto the bed of the truck, and the live-haul driver returns the truck, with the loaded cases and the crew, to Holly Farms' processing plant. There, the birds are slaughtered and prepared for shipment to retail stores.

---

[1] Holly Farms maintains various facilities throughout the United States, but this controversy concerns only its Wilkesboro operation.

[2] Holly Farms' operations also involve birds called "pullets," young chickens destined to serve as laying hens. The live-haul workers whose classification is at issue in this case work exclusively with broilers.

B

In 1989, the Chauffeurs, Teamsters and Helpers, Local 391 (Union), filed a representation petition with the National Labor Relations Board (Board or NLRB), seeking an election in a proposed unit that included live-haul employees working out of Holly Farms' Wilkesboro processing plant. Over Holly Farms' objection, the Board approved the bargaining unit, ruling that the live-haul workers were "employee[s]" protected by the National Labor Relations Act (NLRA or Act), 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*, rather than "agricultural laborer[s]" excluded from the Act's coverage by § 2(3) of the NLRA, 29 U. S. C. § 152(3). See *Holly Farms Corp.*, 311 N. L. R. B. 273, 273, n. 4, 284 (1993).[3] After further proceedings not relevant here, the Board ordered the corporation to bargain with the Union as the representative of the unit. *Id.*, at 285–286.

The United States Court of Appeals for the Fourth Circuit enforced the Board's order. The court held that the Board's classification of the live-haul workers as "employee[s]," rather than "agricultural laborer[s]," rested "on a reasonable interpretation of the Act." 48 F. 3d 1360, 1372 (1995). The Board's reading, the court added, was consistent with the NLRB's prior decisions, see *Imco Poultry, Div. of Int'l Multifoods Corp.*, 202 N. L. R. B. 259, 260–261 (1973), adhered to in *Seaboard Farms of Kentucky, Inc.*, 311 N. L. R. B. No. 159 (1993), and *Draper Valley Farms, Inc.*, 307 N. L. R. B. 1440 (1992), and with the Eighth Circuit's case law, see *NLRB* v. *Hudson Farms, Inc.*, 681 F. 2d 1105,

---

[3] Board member Oviatt dissented from the Board's classification of the live-haul employees. He viewed the crew members as "agricultural laborer[s]," and therefore unprotected by the NLRA. *Holly Farms Corp.*, 311 N. L. R. B., at 287.

1106 *(per curiam)*, cert. denied, 459 U. S. 1069 (1982), and *Valmac Industries, Inc.* v. *NLRB*, 599 F. 2d 246, 249 (1979). 48 F. 3d, at 1371–1372.[4]

Other Federal Courts of Appeals, in conflict with the Fourth and Eighth Circuits, have held that live-haul workers employed by vertically integrated poultry producers are engaged in "agriculture." See, *e. g., Coleman* v. *Sanderson Farms, Inc.*, 629 F. 2d 1077, 1079 (CA5 1980); *NLRB* v. *Ryckebosch, Inc.*, 471 F. 2d 20, 21 (CA9 1972). We granted certiorari to resolve the division of authority. 516 U. S. 963 (1995).

II

The NLRA's protections extend only to workers who qualify as "employee[s]" under § 2(3) of the Act. 29 U. S. C. § 152(3). The term "employee," NLRA § 2(3) states, "[does] not include any individual employed as an agricultural laborer." *Ibid.* No definition of "agricultural laborer" appears in the NLRA. But annually since 1946, Congress has instructed, in riders to Appropriations Acts for the Board: "[A]gricultural laborer," for NLRA § 2(3) purposes, shall derive its meaning from the definition of "agriculture" supplied by § 3(f) of the Fair Labor Standards Act of 1938 (FLSA). See *Bayside Enterprises, Inc.* v. *NLRB*, 429 U. S. 298, 300, and n. 6 (1977).[5]

Section 3(f) of the FLSA provides:

> " 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage

---

[4] Judge Niemeyer dissented in relevant part; like dissenting Board member Oviatt, see *supra*, at 396, n. 3, he ranked the live-haul employees as "agricultural laborer[s]" unprotected by the NLRA. 48 F. 3d, at 1373.

[5] The most recent congressional rider states: "[N]o part of [the Board's] appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the [NLRA] . . . and as defined in section 3(f) of the [FLSA]." Pub. L. 103–333, Tit. IV, 108 Stat. 2569–2570.

> of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." 29 U. S. C. § 203(f).

This definition, we have explained, "includes farming in both a primary and a secondary sense." *Bayside*, 429 U. S., at 300. "Primary farming" includes the occupations listed first in § 3(f): "the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . [and] the raising of livestock, bees, fur-bearing animals, or poultry." 29 U. S. C. § 203(f). "Secondary farming" has a broader meaning, encompassing, as stated in the second part of § 3(f): "any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." *Ibid.;* see *Bayside*, 429 U. S., at 300, n. 7; *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. 755, 763 (1949) (secondary farming embraces "any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations").

If a statute's meaning is plain, the Board and reviewing courts "must give effect to the unambiguously expressed intent of Congress." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984). When the legislative prescription is not free from ambiguity, the administrator must choose between conflicting reasonable interpretations. Courts, in turn, must respect the judgment of the agency empowered to apply the law "to varying fact patterns," *Bayside*, 429 U. S., at 304, even if the issue "with nearly equal reason [might] be resolved one way rather than another," *id.*, at 302 (citing *Farmers Reservoir*, 337 U. S., at 770 (Frankfurter, J., concurring)). We note, furthermore, that administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach. See 48 F. 3d, at 1370 (citing *NLRB* v. *Cal-Maine Farms, Inc.*, 998 F. 2d 1336, 1339 (CA5 1993));[6] cf. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U. S. 388, 392 (1960) (exemptions from the FLSA "are to be narrowly construed against the employers seeking to assert them"); *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, 295 (1959) ("It is well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed.").

III

Primary farming includes the raising of poultry. See *Bayside*, 429 U. S., at 300–301. All agree that the independent growers, who raise Holly Farms' broiler chickens on their own farms, are engaged in primary agriculture. But we confront no contention that Holly Farms' live-haul employees are themselves engaged in raising poultry.[7] Thus, the only question we resolve is whether the chicken catchers, forklift operators, and truckdrivers are engaged in *secondary* agriculture—that is, practices "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." 29 U. S. C. § 203(f).

---

[6] The legislative history suggests that Congress, in linking the definition of "agricultural laborer" in NLRA § 2(3) to § 3(f) of the FLSA, intended to cabin the exemption. The version of the appropriations rider first adopted by the House incorporated the definition of "agricultural laborer" contained in the Social Security Act Amendments of 1939, 53 Stat. 1377. See 92 Cong. Rec. 6689–6692 (1946). Some lawmakers, however, objected that the amendment contained a "very broad definitio[n] of agricultural laborer excluding a great number of processing employees" from NLRA coverage. See *id.*, at 9514 (statement of Sen. Ball). After some debate—and upon consultation with a Board member and Board counsel—the Conference Committee agreed to substitute the "much narrower definition" supplied by § 3(f) of the FLSA. See *ibid.* The dissent's reading of § 3(f), while a plausible construction of a text we, the Board, and the Secretary of Labor find less than crystalline, see *infra*, at 409, is inharmonious with a congressional will to create a slim exemption from the encompassing protection the NLRA and the FLSA afford employees in our Nation's commercial enterprises.

We take up, initially, the "performed by a farmer" strand of FLSA § 3(f). We do not labor over the point, for our decision in *Bayside* securely leads us to the conclusion that the live-haul activities are not performed "by a farmer." In *Bayside,* we considered the application of § 3(f)'s "by a farmer" specification to integrated agricultural companies that contract out farming work. We upheld the Board's rejection of the contention that "all of the activity on a contract farm should be regarded as agricultural activity of an integrated farmer" such as Holly Farms. 429 U. S., at 302. When an integrated poultry producer "contracts with independent growers for the care and feeding of [its] chicks, [its] status as a farmer engaged in raising poultry ends with respect to those chicks." *Id.*, at 302, n. 9 (citing *Imco Poultry,* 202 N. L. R. B., at 260). Accordingly, when the live-haul employees arrive on the independent farms to collect broilers for carriage to slaughter and processing, Holly Farms does not resume its status as "farmer" with respect to those birds, the status Holly Farms had weeks before, when the birds were hatched in its hatcheries. This conclusion, we note, entirely disposes of the contention that the truckdrivers are employed in secondary agriculture, for Holly Farms acknowledges that these crew members do not work "on a farm." Tr. of Oral Arg. 5.

---

[7] Holly Farms, it is true, ultimately argues that the catching and loading of broilers slated for slaughter constitute primary agriculture because those activities are best viewed as the "harvesting" of chickens. See Brief for Petitioners 29–30. But Holly Farms failed to advance this argument before the Court of Appeals, and it did not home in on this contention in its petition for certiorari. Because we "generally do not address arguments that were not the basis for the decision below," *Matsushita Elec. Industrial Co.* v. *Epstein,* 516 U. S. 367, 379, n. 5 (1996), we decline to entertain Holly Farms' primary farming argument.

We turn, now, to the nub of the case for the chicken catchers and forklift operators: the "on a farm" strand of FLSA § 3(f).

A

Holly Farms argues that under the plain language of the statute, the catching and loading of broilers qualifies as work performed "on a farm as an incident to" the raising of poultry. The corporation emphasizes that § 3(f) of the FLSA enumerates "preparation for market" and "delivery to storage or to market" among activities that count as "agriculture." The live-haul employees' work, Holly Farms concludes, thus falls within the domain of the FLSA exemption and, accordingly, enjoys no NLRA protection.

We find Holly Farms' position to be a plausible, but not an inevitable, construction of § 3(f). Hence, we turn to the Board's position, examining only its reasonableness as an interpretation of the governing legislation.

B

While agreeing that the chicken catchers and forklift operators work "on a farm," the Board contends that their catch and cage work is not incidental to farming operations. Rather, the work is tied to Holly Farms' slaughtering and processing operations, activities that do not constitute "farming" under the statute. We conclude, as we next explain, that the Board's position "is based on a reasonable interpretation of the statute, is consistent with the Board's prior holdings, and is supported by the Secretary of Labor's construction of § 3(f)." *Bayside*, 429 U. S., at 303 (footnotes omitted).

1

The Board underscores the statutory words "*such* farming operations." It does not suffice that the alleged secondary agriculture consists of "preparation for market," or "delivery to storage or to market," the Board maintains; to qualify for the statutory exemption, the Board urges, the work must be incidental to, or conjoined with, primary farming operations.[8] As just explained, see *supra*, at 400–401, at the growing stage in the short life of a broiler, Holly Farms is not involved in primary farming, but the contract growers are. The essential question, then, is whether the live-haul employees' activities are inevitably "incident to or in conjunction with" the farming operations of the independent growers.[9] The Board answers this question in the negative.

---

[8] As we noted in *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. 755 (1949), Congress specifically added the words "or on a farm" to FLSA § 3(f) to address some Senators' objections that the exemption otherwise would not cover "the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job." See *id.*, at 767 (citing 81 Cong. Rec. 7653 (1937)). Nothing in the Board's decision detracts from the application of § 3(f), based on the "on a farm" language, to employees of "separate companies organized for and devoted solely to" auxiliary work in aid of a farming enterprise. Hence, the words "on a farm" do the work intended, and are not redundant. But see *post*, at 412–413.

Holly Farms presses the argument that its live-haul employees are analogous to the wheat threshers who figured in FLSA § 3(f)'s legislative history. The Board reasonably responds, however, that *any* worker—whether a wheat thresher, a feed-haul driver, or a chicken catcher—must perform his or her work "as an incident to or in conjunction with such farming operations" in order to fall under the agricultural exemption. If the chicken catching crews were employed by the independent growers, rather than by Holly Farms' processing operation, those crews would more closely resemble the wheat threshers contemplated by the framers of § 3(f).

[9] To this question, the dissent asserts "there can be only one answer." *Post*, at 415. In the dissent's view, activities "directly related to the farming operations that occurred on that very farm"—in this case, removing chickens from the independent growers' farms to make room for more—

See *Imco Poultry*, 202 N. L. R. B., at 261 (Because chicken catching crews "have no business relationship with the independent farmers, we conclude that the employees' activities were not incidental to the independent farmers' poultry raising operations.").

We find the Board's answer reasonable. Once the broilers have grown on the farm for seven weeks, the growers' contractual obligation to raise the birds ends, and the work of the live-haul crew begins. The record reflects minimal overlap between the work of the live-haul crew and the independent growers' raising activities. The growers do not assist the live-haul crews in catching or loading the chickens; their only responsibilities are to move certain equipment from the chicken coops prior to the crews' arrival, and to be present when the crews are on the farms. App. to Brief for Federal Respondent 3a. Nor do the live-haul employees play any role in the growers' performance of their contractual undertakings.

The record, furthermore, supports the Board's conclusion that the live-haul crews' activities were conjoined with Holly Farms' processing operations, rather than with farming.[10]

---

inescapably satisfy the statute. *Post*, at 414–415. FLSA § 3(f), all agree, does not apply absent a connection between the activity in question and the primary farming operations conducted "on a farm." But the statutory language—"incident to or in conjunction with"—does not place beyond rational debate the nature or extent of the required connection. See 29 CFR § 780.144 (1995) (recognition by the Secretary of Labor that the "line between practices that are and those that are not performed 'as an incident to or in conjunction with' such farming operations is not susceptible of precise definition").

[10] Holly Farms argues, and the dissent agrees, *post*, at 414, that the Board's conclusion rests on the assumption that a given activity can be incidental to one thing only—in this case, either processing or farming, but not both. At oral argument, counsel for the Board stated that Holly Farms had not accurately conveyed the Board's position. Tr. of Oral Arg. 33, 38. The Board apparently recognizes, as do we, that an activity can be incidental to more than one thing. To gain the agricultural exemption, however, farming must be an enterprise to which the activity at issue is incidental. The relevant question under the statute, therefore,

The chicken catchers, forklift operators, and truckdrivers work as a unit. They all "work out of the processing plant" in Wilkesboro, App. 22a, located three miles from the hatcheries, App. to Pet. for Cert. A–381, n. 119. Crew members begin and end each shift by punching a timeclock at the processing plant, *id.*, at A–831 to A–832, and are functionally integrated with other processing-plant employees, App. 22a. See also App. to Pet. for Cert. A–396 (correlation between Holly Farms' slaughter rate and work available for live-haul crews); App. 29a (live production manager for Holly Farms' Wilkesboro facility described catching and delivery of grown broilers as the first step in the producer's processing operations). The Board's determination, in sum, has the requisite "warrant in the record." *Bayside,* 429 U. S., at 304, n. 14 (citing *NLRB* v. *Hearst Publications, Inc.,* 322 U. S. 111, 131 (1944)).

We think it sensible, too, that the Board homed in on the status of the live-haul crews' *employer.* The employer's status respecting the particular activity at issue accounts for the Board's determination that Holly Farms' "egg haulers" (who transport eggs from the laying houses to the hatcheries), and "pullet catchers" (who collect the breeding-destined birds on the farms of independent growers) rank as "agricultural laborer[s]." As the record shows, the pullet catchers and egg haulers work in Holly Farms' hatchery operations, while the live-haul employees—who deal only with broilers—work out of the processing plant. "There is no interchange between these classifications. Broiler haulers do not haul pullets and pullet haulers do not haul broilers." App. 20a–21a. Accordingly, the Board reasonably aligned the pullet catchers and egg haulers with Holly Farms' poultry-raising operation, and the live-haul employees with the corporation's slaughtering and processing activities.

---

is whether the work of the live-haul crews qualifies as incidental to farming.

2

The Board's decision regarding Holly Farms' live-haul crews adheres to longstanding NLRB precedent. For more than 23 years, the NLRB has maintained that vertically integrated poultry producers' employees who "handl[e] and transpor[t] chicks on the farms of independent growers only after [the poultry producers'] farming operations have ended . . . cannot be performing practices incident to, or in conjunction with, [their employer's] farming operations." *Imco Poultry,* 202 N. L. R. B., at 260. Rather, such employees, the Board has repeatedly ruled, perform work "incident to, or in conjunction with, a separate and distinct business activity of [their employer], i. e., shipping and marketing." *Id.,* at 261. See also *Draper Valley Farms, Inc.,* 307 N. L. R. B., at 1440 ("We think it follows plainly from *Imco* that the Employer's chicken catchers are not, when working on the farms of independent growers who have concluded their 'raising' activities, exempt as agricultural laborers."); *Seaboard Farms of Kentucky, Inc.,* 311 N. L. R. B. No. 159 (1993) (same).[11]

3

In construing the agricultural laborer exemption, the Board endeavors to "follow, whenever possible, the interpretations of Section 3(f) adopted by the Department of Labor, the agency which is charged with the responsibility for and has the experience of administering the Fair Labor Standards Act." *Cornell University,* 254 N. L. R. B. 110 (1981); see also *Mario Saikon, Inc.,* 278 N. L. R. B. 1289, 1290 (1986); *Wegman's Food Market, Inc.,* 236 N. L. R. B. 1062 (1978). The Board has not departed from that endeavor here.[12] The Department of Labor's regulations do not address the precise situation of the live-haul workers before us, nor are the regulations free from ambiguity. We agree with the Board, however, that they are consistent with "employee" characterization of the crews that catch grown chickens for carriage to Holly Farms' processing plant.

---

[11] Our decision in *Maneja* v. *Waialua Agricultural Co.,* 349 U. S. 254 (1955), does not cast doubt on the Board's view of operations like Holly Farms. In that case, which did not involve a Board ruling, we held that railroad workers employed by an integrated sugar cane producer were exempt, as "agricultural laborer[s]," from FLSA overtime provisions. The employer in *Maneja,* unlike Holly Farms, grew and cultivated its sugar cane autonomously, without the aid of independent growers; hence, we concluded that the activities of the railroad workers, who hauled the freshly cut cane from the sugar fields to the processing plant, were incidental to the employer's primary farming operations. *Id.,* at 262–263.

On contract arrangements for raising poultry, the Department of Labor has issued an interpretative regulation, which we noted in *Bayside,* 429 U. S., at 303–304, n. 13, as follows:

> "Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not 'raising of poultry,' and employees engaged in them cannot be considered agricultural employees on that ground. Employees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in 'secondary' agriculture (see

---

[12] *Coleman* v. *Sanderson Farms, Inc.,* 629 F. 2d 1077 (CA5 1980), which determined that chicken catching crews were employed in "agriculture" under § 3(f), involved a dispute over applicability of the FLSA's overtime provisions, not over union representation. Thus, the court in that case was not required to respect the position of the Board. See *id.,* at 1081, n. 4. We note, however, that the *Coleman* court did not advert to the Secretary of Labor's interpretations of § 3(f).

> §§ 780.137 *et seq.* [explaining that work must be performed in connection with the farmer-employer's own farming to qualify as 'secondary' agriculture by a farmer] and *Johnston* v. *Cotton Producers Assn.*, 244 F. 2d 553)." 29 CFR § 780.126 (1995).

This regulation suggests that live-haul crews surely are not engaged in a primary farming operation. The crews could rank as workers engaged in "secondary" agriculture if they "perform[ed] work on a farm as an incident to or in conjunction with the raising of poultry on the farm." *Ibid.* As we developed earlier, however, see *supra,* at 402–405, in the Board's judgment, the crews do not fit that bill. The live-haul crew members perform their work, as the Board sees it, not "as an incident to" poultry raising by independent growers, but "incident to" and "in conjunction with" the slaughter and processing of chickens at Holly Farms' Wilkesboro plant. In the Board's words, the crews are tied to "a separate and distinct business activity," the business of processing poultry for retail sale, see *Imco Poultry,* 202 N. L. R. B., at 261, not to the anterior work of agriculture.[13]

Other Department of Labor regulations are in harmony with the Board's conclusion that the live-haul crews do not engage in secondary farming because their work, though "on a farm," is not performed "as an incident to or in conjunction with" the independent growers' poultry-raising operations. Thus, 29 CFR § 780.129 (1995) reiterates that the work "must be performed 'as an incident to or in conjunction with' the farming operations," and § 780.143 adds:

---

[13] The Department of Labor's interpretative regulation, 29 CFR § 780.126 (1995), includes a citation to *Johnston* v. *Cotton Producers Assn.*, 244 F. 2d, 553, 554 (CA5 1957). That case is readily distinguishable from the case before us. In *Johnston,* the Court of Appeals held that an employee of a rural farm supply store was exempt from FLSA minimum wage and overtime requirements as an agricultural laborer. The supply store sold baby chicks to farmers, while "retain[ing] title to the chicks as security for the purchase price and for advances for feed, supplies, or equipment." *Ibid.* While the supply store employee caught, cooped, and loaded chickens onto trucks for delivery to processors—entities independent of the supply store—that employee also "supervise[d] the growing of chicks by [independent] growers on their farms." *Ibid.* By contrast, in this case there is no contention that any of the live-haul employees similarly assist the independent growers in their chick-raising activities.

> "The fact that a practice performed on a farm is not performed by or for the farmer is a strong indication that it is not performed in connection with the farming operations there conducted." *Ibid.*

The same regulation, § 780.143, further states that, in determining whether a practice is performed "for" a farmer, it is "highly significant" whether the practice involves property to which the farmer has title or for which the farmer otherwise has responsibility. *Ibid.* Holly Farms retains title to the chicks and, once the live-haul crew undertakes its catch and remove operation, the independent grower "divest[s] himself of further responsibility with respect to the product." *Ibid.*[14]

The Department of Labor candidly observed that "[t]he line between practices that are and those that are not performed 'as an incident to or in conjunction with' such farming operations is not susceptible of precise definition." § 780.144. This acknowledgment accords with our recognition that the meaning of FLSA § 3(f) is not so "plain" as to bear only one permissible construction in the context at hand.

IV

In sum, we find persuasive the Board's conclusion that the collection of broilers for slaughter was an activity serving

---

[14] Petitioners point to 29 CFR § 780.151(k) (1995), which defines the FLSA § 3(f) words "preparation for market" to include "[c]ulling, grading, cooping, and loading" of poultry. See Brief for Petitioners 23. As another regulation emphasizes, however, "'preparation for market,' like other practices, must be performed 'by a farmer or on a farm as an incident to or in conjunction with such farming operations' in order to be within [FLSA] section 3(f)." 29 CFR § 780.150 (1995).

Holly Farms' processing operations, and not Holly Farms' own or the independent growers' farming operations. Again, we stress that "the reviewing court's function is limited." *Bayside,* 429 U. S., at 304, n. 14 (citing *Hearst Publications,* 322 U. S., at 131). For the Board to prevail, it need not show that its construction is the *best* way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one. See *Sure-Tan, Inc.* v. *NLRB,* 467 U. S. 883, 891 (1984) ("we will uphold any interpretation [of the term 'employee' in NLRA § 2(3)] that is reasonably defensible"). "[R]egardless of how we might have resolved the question as an initial matter," *Bayside,* 429 U. S., at 304, the Board's decision here reflects a reasonable interpretation of the law and, therefore, merits our approbation. The judgment of the Court of Appeals is accordingly

Affirmed.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

Today the Court concludes that three categories of workers fall outside the definition of "agricultural laborer" supplied by § 3(f) the Fair Labor Standards Act of 1938 (FLSA) and § 2(3) of the National Labor Relations Act (NLRA): (1) Holly Farms' chicken catchers, who labor on a farm manually rounding up, catching, and caging live chickens, (2) forklift operators, who then load the caged chickens onto the bed of a flatbed truck, and (3) live-haul drivers, who drive the loaded trucks to Holly Farms' processing plants, where the chickens are slaughtered and prepared for market. I concur in the Court's judgment with respect to the live-haul drivers, since their work is neither performed "by a farmer" nor "on a farm." But the Court's conclusion that Holly Farms' chicken catchers and forklift operators do not perform agricultural work runs contrary to common sense and finds no support in the text of the relevant statute. Because the definition supplied by Congress makes clear that the chicken catchers and forklift operators are agricultural workers exempt from the reach of the NLRA, I respectfully dissent.

The Court devotes the bulk of its opinion to an analysis of the reasonableness of the National Labor Relations Board's (Board) interpretation of the statute, but gives remarkably short shrift to the statute itself. The Court dismisses Holly Farms' claim that the plain language of the statute covers the chicken catchers and forklift operators with the conclusory remark that Holly Farms' reading of the statute is "a plausible, but not an inevitable, construction of § 3(f)." *Ante*, at 401. In my view, however, the language of the statute is unambiguous.

As we said in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984): "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842–843. None of our precedents sanction blind adherence to the Board's position when it is directly contrary to the plain language of the relevant statute. See, *e. g.*, *NLRB* v. *Brown*, 380 U. S. 278, 291 (1965) ("Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute"); *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965) ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . ."). Section 3(f) of the FLSA defines agriculture as "farming in all its branches," including "the raising of . . . poultry," as well as "any practices . . . performed by a farmer *or on a farm as an incident to or in conjunction with such farming operations.*" 29 U. S. C. § 203(f) (emphasis added). The coverage intended by Congress under both the FLSA and the NLRA is best determined by consulting the language of the statute at issue. Because the relevant portions of § 3(f) are perfectly plain and "directly [speak] to the precise question at issue," *Chevron, supra,* at 842, I would hold that the chicken catchers and forklift operators are agricultural laborers and that the Board's contrary conclusion does not deserve deference.

The Court's determination rests largely upon a misreading of the statute in two respects. First, the Court tethers the "or on a farm" clause of § 3(f) to the employment relationship (or lack thereof) between the chicken catchers and forklift operators and the independent farmer who is charged with raising the chickens. And second, the Court decides that the secondary farming activities performed by the chicken catchers and forklift operators must not only be "incident" to the independent farmer's primary farming activities, but must be "mainly" or "most tightly" tied thereto. Neither conclusion finds support in the language of § 3(f).

The Court's first error stems from its adoption of the Board's focus on the lack of a direct employment relationship between the live-haul workers and the independent growers. But the "or on a farm" clause nowhere mentions the nature of the employment relationship. Instead, it is plainly concerned only with the *nature* of the work performed by the worker. The Board's interpretation must be rejected, as it would read the "or on a farm" clause out of the statute entirely.

The Court relies on the legislative history underlying the "or on a farm" clause, which we described in *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U. S. 755, 763 (1949). That history reveals that the clause was intended to include within the statutory definition work performed on a farm that was "necessary to" the farming operations but not performed by the farmer himself. *Id.,* at 767. One example figures prominently in the legislative history: a wheat thresher who travels from farm to farm performing wheat threshing chores for small farmers on a contract basis. The Court reasons that Holly Farms' employees are unlike the fictional wheat thresher, however, in that they are employed by Holly Farms, rather than by the independent growers themselves. See *ante,* at 402, n. 8 ("If the chicken catching crews were employed by the independent growers, rather than by Holly Farms' processing operation, those crews would more closely resemble the wheat threshers contemplated by the framers of § 3(f)").

The Court and the Board emphasize formal contractual arrangements to the virtual exclusion of practical realities. The fact that Holly Farms supplies the services of the chicken catchers and forklift operators seems entirely beside the point; the work performed by these employees is precisely the same whether they are hired by Holly Farms or by the independent growers. And the notion that Congress intended the status of the chicken catchers and forklift operators to turn on such a readily manipulable criterion strains credibility. If the live-haul crew's status depends only upon who "hires" them to perform the work, Holly Farms can simply charge the independent growers with raising *and* catching, caging, and cooping the chickens, and require the independent growers to hire Holly Farms' own live-haul workers to perform those tasks.

The Court's quotation from *Imco Poultry, Div. of Int'l Multifoods Corp.,* 202 N. L. R. B. 259 (1973), reveals precisely where the Board and the Court have gone astray: The Board takes the position that live-haul workers " 'cannot be performing practices incident to, or in conjunction with, [their employer's] farming operations.' " *Ante,* at 405 (quoting *Imco Poultry, supra,* at 260). But the statute does *not* require that work be performed "incident to or in conjunction with" one's *employer's* farming operations, but only incident to or in conjunction with "such" farming operations—the antecedent for which term is plainly the first clause of

§ 3(f), to wit, "farming in all its branches," including "the raising of . . . poultry." If the *sine qua non* of status as an agricultural laborer is employment *by the farmer or the independent grower*, the "or on a farm" clause is redundant, because chicken catching crews that are agents or employees of the farmers themselves fall within the "by a farmer" clause. Ordinarily, "terms connected by a disjunctive [are] given separate meanings, unless the context dictates otherwise." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979). The "or on a farm" clause has independent significance only if the work encompassed by that clause is performed by someone *other than* a farmer or the farmer's own agents or employees. *Chevron* deference is not owed to a Board construction of the statute that effectively redacts one of the statute's operative clauses.

The Court also cites with approval a Department of Labor (DOL) interpretive regulation that addresses contractual arrangements for raising poultry such as those between Holly Farms and the independent growers. The DOL regulation declares that "[e]mployees of [a] feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in 'secondary' agriculture." 29 CFR § 780.126 (1995). The Court thus accepts as reasonable a DOL regulation that plainly suggests that even workers *employed by* a poultry processor such as Holly Farms can be engaged in secondary agriculture and also accepts as reasonable a Board interpretation of § 3(f) that, in essence, dictates that employees of a processor cannot be employed in secondary agriculture. See *ante*, at 404 ("We think it sensible . . . that the Board homed in on the status of the live-haul crews' *employer*") (emphasis in original). The Court cannot have it both ways, and it need not, since the "or on a farm" clause is plainly indifferent to the nature of the employment relationship.

The Court's second misstep likewise derives from its deference to a Board construction that lacks foundation in the statute. Section 3(f) exempts work performed "as an incident to or in conjunction with" primary farming operations. The statutory language manifestly does not disqualify the work from agricultural status if it also "serve[s]," *ante,* at 408, or is "tied to," *ante,* at 407, some other enterprise. Even accepting the Court's conclusion that the work of the chicken catchers and forklift operators is "incident to" Holly Farms' processing operations, those workers fall within the § 3(f) definition so long as their work is *also* "incident to or in conjunction with" the farming operations performed by the independent growers.

As Holly Farms points out, the Board's contrary position hinges on the premise that a given activity can only be incident to one thing—either processing or farming, but not both. But the Board's position cannot be squared with the statute itself, which places no conditions upon the statutory prerequisite that work be "incident to or in conjunction with" covered farming operations. Indeed, the wheat thresher of the legislative history was clearly performing work "incident to" the business operations of the wheat threshing enterprise as well as "incident to" the farmer's farming operations. The statutory requirement is simple, and the imposition of a more stringent prerequisite must be rejected as contrary to the statute itself.

When the chicken catchers and forklift operators arrive at the farm of an independent grower to catch, cage, and load the live chickens in preparation for their delivery to market, they are certainly doing work that is directly related to the farming operations that occurred on that very farm during the preceding weeks: the raising of poultry. As Holly Farms points out, unless the chickens are caught, caged, and removed from the farm, the independent grower's farming operations will have been for naught. The independent grower must see to it that the chickens grow to the designated age and are caught, removed, and replaced with new chicks for the next growing cycle. See Brief for Petitioners

23. And the fact that § 3(f) lists "preparation for market" as one of the activities that customarily is "incident to or in conjunction with" covered farming operations buttresses petitioners' argument.

The Court's response relies on the facts that the independent grower's contractual duties have ended, that the workers punch a timeclock in Holly Farms' processing plant rather than in Farmer Brown's barn, and that Holly Farms rather than the independent grower signs their paychecks at the end of the day. But these facts are irrelevant to the statutory definition. Section 3(f) asks only whether the chicken catchers and forklift operators perform work "on a farm" (which all parties concede they do) and whether that work is "incident to or in conjunction with such farming operations"—that is, whether the activities of the chicken catching crews are "incident to" the covered farming operations that take place on the farms of the independent growers, the raising of poultry for slaughter. To that question, there can be only one answer.

Because the Court today defers to an NLRB interpretation that runs directly contrary to the statutory language, I respectfully dissent from the Court's conclusion with respect to the chicken catchers and forklift operators.

CARLISLE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 94–9247. Argued January 16, 1996—Decided April 29, 1996

At his trial on a federal marijuana charge, petitioner filed his motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29(c) after the jury returned a guilty verdict and was discharged. The District Court granted the motion even though it was filed one day outside the time limit prescribed by Rule 29(c), which provides, *inter alia*, that "[i]f the jury returns a verdict of guilty . . . , a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." In reversing and remanding for reinstatement of the verdict and for sentencing, the Sixth Circuit held that under Rule 29 a district court has no jurisdiction to grant an untimely motion for judgment of acquittal, or to enter such a judgment *sua sponte* after submission of the case to the jury.

Held: The District Court had no authority to grant petitioner's motion for judgment of acquittal filed one day outside the Rule 29(c) time limit. Pp. 419–433.

(a) The Rules do not permit the granting of an untimely postverdict motion for judgment of acquittal. Rule 29(c)'s text, when read with Rule 45(b)'s statement that "the court may not extend the time for taking any action under Rul[e] 29 . . . except to the extent and under the conditions stated in [the Rule]," is plain and unambiguous: If, as in this case, a guilty verdict is returned, a motion for judgment of acquittal must be filed either within seven days of the jury's discharge or within an extended period fixed by the court during that 7-day period. Furthermore, in light of Rule 29(c)'s clarity, petitioner cannot rely either on Rule 2, which requires that ambiguous Rules "be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay," or on Rule 57, which allows district courts discretion to regulate practice when there is no controlling law. Pp. 419–425.

(b) This Court rejects petitioner's invocation of courts' "inherent supervisory power" as alternative authority for the District Court's action. Whatever the scope of federal courts' inherent power to formulate procedural rules not specifically required by the Constitution or the Congress, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.

See, *e. g., Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 254–255. Whether the District Court's action is described as the granting of an untimely motion, or the *sua sponte* entry of a judgment of acquittal, it contradicted Rule 29(c)'s plain language and effectively annulled the 7-day filing limit. The cautionary principle that the Court will not lightly assume that the Rules mean to depart from established principles does not apply in this case, because prior to the enactment of Rule 29, there was no long, unquestioned power of federal district courts to acquit for insufficient evidence *sua sponte*, after return of a guilty verdict. Pp. 425–428.

(c) The Court also rejects petitioner's remaining arguments: (1) that the District Court had power to order acquittal in this case under the All Writs Act, 28 U. S. C. § 1651, through the writ of *coram nobis;* (2) that the failure to allow the District Court to order acquittal would violate the Fifth Amendment's Due Process Clause; and (3) that prohibiting a district court from granting an acquittal motion filed only one day late will lead to needless appeals and habeas corpus proceedings. Pp. 428–430.

(d) The Court rebuts arguments put forward by the dissent, including the proposition that permissive rules do not withdraw pre-existing inherent powers, and the dissent's reliance on this Court's precedents to support the existence of the "inherent power" petitioner invokes. Pp. 430–433.

48 F. 3d 190, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, *post*, p. 434. GINSBURG, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 434. STEVENS, J., filed a dissenting opinion, in which KENNEDY, J., joined, *post*, p. 436.

James A. Christopherson argued the cause and filed briefs for petitioner. With him on the briefs was *Joel R. Myler.*

Paul A. Engelmayer argued the cause for the United States. With him on the brief were *Solicitor General Days, Acting Assistant Attorney General Keeney, Deputy Solicitor General Dreeben,* and *David S. Kris.*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a district court has authority to grant a postverdict motion for judgment of acquittal filed one day outside the time limit prescribed by Federal Rule of Criminal Procedure 29(c).

I

Petitioner Charles Carlisle, along with several codefendants, was tried by jury in the United States District Court for the Western District of Michigan for conspiracy to possess with intent to distribute marijuana, in violation of 21 U. S. C. §§ 841, 846, 84 Stat. 1260, 1265. He did not move during the trial for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a). On July 13, 1993, the jury returned a guilty verdict and was discharged. On July 23, 1993, Carlisle filed a "Motion for a Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29(c)," arguing that there was insufficient evidence to sustain his conviction. App. 6–9. Rule 29(c) provides that "a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Excluding the intermediate Saturday and Sunday (as Federal Rule of Criminal Procedure 45(a) requires), the 7-day period in this case ended on July 22, 1993. The United States' response to Carlisle's motion argued that it should be denied as untimely and, alternatively, that there was sufficient evidence to sustain the conviction. The District Court denied Carlisle's motion on August 19, 1993. Its written opinion did not address the timeliness issue, but concluded that the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that Carlisle knew about, and knowingly and voluntarily joined, the charged conspiracy.

When Carlisle appeared for sentencing on October 14, 1993, the District Court announced that it was reversing its ruling. When it made its decision in August, the court said, it had prepared two opinions, one granting and one denying the motion, and it had now decided to substitute the former for the latter. The court subsequently entered an order that

(i) withdrew the opinion and order denying the motion to acquit and (ii) granted "Carlisle's motion for a judgment of acquittal pursuant to Rule 29(c), filed July 23, 1993." App. 45. An opinion accompanying the order concluded that there was insufficient evidence to prove that Carlisle knowingly and voluntarily joined the conspiracy to possess and distribute marijuana. In a footnote, the opinion acknowledged that the motion for judgment of acquittal was filed one day late, but concluded:

> ". . . I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day lat[e] in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because [Rule 29(c)] permits the Court to extend the deadline, I will consider this motion as if it were filed in a timely manner." *Id.*, at 37.

The United States Court of Appeals for the Sixth Circuit reversed the judgment of acquittal and remanded to the District Court for reinstatement of the jury's verdict and for sentencing. It held that under Rule 29 a district court has no jurisdiction to grant an untimely motion for judgment of acquittal, and that a district court has no jurisdiction to enter a judgment of acquittal *sua sponte* after the case has been submitted to the jury. 48 F. 3d 190, 192 (1995). We granted certiorari. 515 U. S. 1191 (1995).

II

Petitioner argues that district courts "should be given the power to go outside the strict time limits of Federal Rule of Criminal Procedure 29(c)" when (1) there is a claim that the defendant was legally innocent, (2) the motion is filed prior to sentencing, and (3) the motion was not timely filed because of attorney error. Brief for Petitioner 8. Petitioner seeks to root this argument in, among other places, the Federal Rules of Criminal Procedure.

Rule 29 is reproduced in its entirety below.[1] Subdivision (c) provides, in relevant part, that "[i]f the jury returns a verdict of guilty . . . , a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Federal Rule of Criminal Procedure 45(b) provides that whereas certain untimely acts may be accorded validity upon a showing of excusable neglect, "the court may not extend the time for taking any action under Rul[e] 29 . . . except to the extent and under the conditions stated in [the Rule]." These Rules are plain and unambiguous. If, as in this case, a guilty verdict is returned, a motion for judgment of acquittal must be filed, either within seven days of the jury's discharge, or within an extended period fixed by the court during that 7-day period. There is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion is accompanied by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error.

---

[1] "Rule 29. Motion for Judgment of Acquittal

"(a) MOTION BEFORE SUBMISSION TO JURY. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

"(b) RESERVATION OF DECISION ON MOTION. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

"(c) MOTION AFTER DISCHARGE OF JURY. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

"(d) SAME: CONDITIONAL RULING ON GRANT OF MOTION. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court."

Unable to offer any reading of Rule 29(c) that would permit an untimely motion for judgment of acquittal to be granted, Carlisle contends that Rule 29(a) gives a district court authority to enter a judgment of acquittal *sua sponte* at any time before sentencing. Rule 29(a), entitled "Motion Before Submission to Jury," provides in relevant part:

> "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

It would be quite a surprise to find a district court's *sua sponte* power to grant judgment of acquittal *after* submission of the case to the jury hidden away in a provision entitled "Motion *Before* Submission to Jury." We are not inclined to adopt an interpretation that creates such a surprise unless the intent that the text exceed its caption is clear.

Here, to the contrary, the structure of Rule 29 indicates that subdivision (a) is limited as its caption says.

Petitioner's proposed reading would create an odd system in which defense counsel could move for judgment of acquittal for only seven days after the jury's discharge, but the court's power to enter such a judgment would linger. In *United States* v. *Smith,* 331 U. S. 469 (1947), we declined to read former Federal Rule of Criminal Procedure 33, which placed a 5-day limit on the making of a motion for new trial, as "permit[ting] the judge to order retrial without request and at any time," 331 U. S., at 473. "[I]t would be a strange rule," we said, "which deprived a judge of power to do what was asked when request was made by the person most concerned, and yet allowed him to act without petition," and such an arrangement "would almost certainly subject trial judges to private appeals or application by counsel or friends of one convicted," *id.*, at 474, 475. The same is true here.[2] In addition, petitioner's reading makes a farce of subdivision (b) of Rule 29, which provides that a court may reserve decision on the motion for judgment of acquittal and decide it after submission to the jury. There would be no need for this procedure if, even without reserving, the court had continuing power to grant judgment of acquittal on its own. In sum, even without the captions (and *a fortiori* with them) it is clear that subdivisions (a) and (b) of Rule 29 pertain to motions made before submission, and subdivisions (c) and (d) to motions made after discharge.

---

[2] The dissent forcefully argues that *Smith* does not compel the result we reach in this case. *Post,* at 452–453. That is an effective rejoinder to an argument we have not made. In response to the argument we *have* made—that some of the considerations supporting the holding in *Smith* apply here—the dissent (i) ignores the portion of *Smith* discussing the strangeness of a rule that would give a judge greater power to act *sua sponte* than on motion; and (ii) transforms *Smith's* desire to spare trial judges "private appeals or application by counsel or friends of the person convicted" into a concern for the "appearance of impropriety" that "*ex parte* approaches" would create, *post,* at 453, which concern in the present context (though presumably for some reason not in the *Smith* context) the dissent regards as "a highly inappropriate comment on the integrity of the federal judiciary," *ibid.*, and the dissent says it was dictum in *Smith* anyway.

The Government offers an alternative theory of a court's power to act *sua sponte* under Rule 29: Because Rule 29(a) refers to both a "motion of a defendant" and a court's "own motion," whereas Rule 29(c) refers only to "a motion" *simpliciter*, the latter must refer to motions both of defendants and of courts, permitting both such "motions" to be made within seven days after the jury's discharge. We do not find this reading plausible. Rule 29(c) not only provides that "a motion for judgment of acquittal" may be made or renewed within seven days after the jury is discharged. It goes on to provide, in its second and third sentences: "*If a verdict of guilty is returned* the court may *on such motion* set aside the verdict and enter judgment of acquittal. *If no verdict is returned* the court may enter judgment of acquittal." The phrase "on such motion" is notably absent from the third sentence—conveying the idea that, where a jury has not returned a verdict, a court can act without motion, but where a jury has returned a guilty verdict, it cannot. But if "on such motion" includes action taken by a court on its own initiative, the limiting phrase "on such motion" in the second sentence has no effect, and a court may act on its own *whether or not* a verdict has been returned. That is to say, the inclusion of the phrase "on such motion" in one sentence but not in the other would be inexplicable.[3]

---

[3] Perhaps even more inexplicable is what precisely would be achieved by the Government's reading, which (unlike petitioner's theories) would permit the court to act *sua sponte* only during the 7-day period specified by the Rule (or any extension thereof ordered by the court during the 7-day period, as Rule 29(c) allows). The sole beneficiary of the Government's textual contortions is the district judge who wants to set aside a verdict, but lacks the wit to invite a motion for that during the 7-day period, or (if defendant's counsel is unavailable) to extend the 7-day period,

Petitioner contends that even if Rule 29 does not permit a court to grant an untimely motion for judgment of acquittal, Federal Rule of Criminal Procedure 2 vests the court with supervisory power to enter judgment of acquittal. Rule 2 provides:

> "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

This Rule is of no aid to petitioner. It sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superseding clear rules that do not achieve the stated objectives. It does not, that is to say, provide that rules shall be construed to mean something other than what they plainly say—which is what petitioner's proposed construction of Rule 29(c) would require.

We must acknowledge that there is precedent in this Court for using Rule 2 as a basis for deviating from time limits imposed by the Federal Rules of Criminal Procedure. In *Fallen* v. *United States*, 378 U. S. 139 (1964), we cited Rule 2 in the course of excusing the failure of an incarcerated paraplegic *pro se* petitioner to comply with the time limit for filing a notice of appeal under former Federal Rule of Criminal Procedure 37(a). Concluding that the petitioner "had done all that could reasonably be expected" to file a timely appeal, including mailing a notice of appeal to the clerk's office two days before the notice was due, we "decline[d] to read the Rules so rigidly as to bar a determination of his appeal on the merits." 378 U. S., at 144. *Fallen* has been made obsolete by an amendment to Rule 37(a).[4] And

---

sua sponte, in order to invite such a motion later. It is our hope and belief that no such district judge exists.

[4] Rule 37(a) was amended in 1966 to provide that a district court may extend the time for filing a notice of appeal "[u]pon a showing of excusable

of course *Fallen* was a narrow ruling when it was announced, as is evident from *Berman* v. *United States,* 378 U. S. 530 (1964) *(per curiam),* a decision announced on the same day as *Fallen,* summarily affirming the dismissal of an appeal that had been filed one day late.

Finally, petitioner cannot rely on Federal Rule of Criminal Procedure 57 as the source of the District Court's authority in this case. The version of Rule 57 in effect when criminal proceedings against petitioner commenced (and which he relied upon at oral argument) states, in relevant part, that, "[i]n all cases not provided for by rule, the district judges . . . may regulate their practice in any manner not inconsistent with these rules." The relevant portion of the current version of Rule 57 is captioned "Procedure When There Is No Controlling Law," and states: "A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district." Fed. Rule Crim. Proc. 57(b). We need not decide which version of this Rule controls the present case, because neither authorizes the District Court's action here. A rule permitting a party to submit and prevail on an untimely motion for judgment of acquittal is "inconsistent" (or not "consistent") with Rule 29's 7-day filing limit; and the question of when a motion for judgment of acquittal may be granted does not present a case "not provided for" by Rule 29; and Rule 29 is the "controlling law" governing this question.

III

As alternative authority for the District Court's action, petitioner invokes courts' "inherent supervisory power." Brief for Petitioner 9. We have recognized that federal

---

neglect." See Fed. Rule Crim. Proc. 37(a) (1966). When Rule 37(a) was abrogated and replaced by Federal Rule of Appellate Procedure 4(b), the substance of this amendment was transferred to Rule 4(b). See Fed. Rule App. Proc. 4(b) (1968).

courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States* v. *Hasting*, 461 U. S. 499, 505 (1983). Whatever the scope of this "inherent power," however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure. As we recognized in *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 254–255 (1988), holding that federal courts may not invoke supervisory power to circumvent Rule 52(a): "[F]ederal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." Whether the action of the District Court here is described as the granting of an untimely motion, or the *sua sponte* entry of a judgment of acquittal, it contradicted the plain language of Rule 29(c), and effectively annulled the 7-day filing limit.

In *Chambers* v. *NASCO, Inc.*, 501 U. S. 32, 47 (1991), we said that we would not "'lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power," *id.*, at 47 (quoting *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 313 (1982)). Similarly, in *Link* v. *Wabash R. Co.*, 370 U. S. 626, 629–632 (1962), we said that since a district court's authority to dismiss *sua sponte* for lack of prosecution was a "sanction of wide usage," we would not assume, in the absence of a clear expression, that Federal Rule of Civil Procedure 41(b), which allowed a party to *move* for dismissal for lack of prosecution, abrogated this "long . . . unquestioned" power. That cautionary principle does not apply in the present case, not only because of the clarity of the text, but also because we are unaware of any "long unquestioned" power of federal district courts to acquit for insufficient evidence *sua sponte*, after return of a guilty verdict. Indeed, we are aware of only two cases prior to the enactment of the Federal Rules of Criminal Procedure that could be read as asserting in dictum the existence of such a power. *United States* v. *McCracken,* 26 F. Cas. 1069, 1069 (No. 15,664) (ED Va. 1878); *United States* v. *Hayden,* 26 F. Cas. 236, 238 (No. 15,333) (NDNY 1877).[5]

---

[5] The dissent's extended discussion of pre-Rule federal cases produces a lot of smoke, and no fire. *Ansley* v. *United States,* 135 F. 2d 207, 208 (CA5 1943), described by the dissent as "establishing a district court's inherent power to review *sua sponte* a jury verdict for sufficiency of the evidence," *post,* at 446, establishes no such thing. There, after noting the appellants' failure to renew their motions for directed verdict at the close of evidence, the Fifth Circuit said:

"[T]he question of the sufficiency of the evidence was not properly saved for review by this court. It is true that the question may and should be raised by the court of its own motion, if necessary to prevent a miscarriage of justice, but this is not such a case. We have examined the record, and have found it to contain ample evidence to support the judgment." 135 F. 2d, at 208.

It is obvious that the statement "the question may and should be raised by the court of its own motion" refers to the power of an *appellate* court to review sufficiency of the evidence where the issue has not been preserved for appeal. The cases cited by the dissent deal with the power of a district court to enter a judgment of acquittal *before* the return of a verdict (*i. e.,* to direct a verdict of acquittal), see *Cady* v. *United States,* 293 F. 829 (CADC 1923); *Nosowitz* v. *United States,* 282 F. 575, 578 (CA2 1922); *United States* v. *Fullerton,* 25 F. Cas. 1225 (No. 15,176) (SDNY 1870); the power of a district court to set aside a verdict and order a new trial, see *Wiborg* v. *United States,* 163 U. S. 632, 658–659 (1896); *United States* v. *Harding,* 26 F. Cas. 131, 136 (No. 15,301) (ED Pa. 1846); cf. *Charles* v. *State,* 4 Port. 107, 109–110 (Ala. 1836); the power of a district court to enter judgment of acquittal where the defendant *has made* a preverdict or postverdict motion to acquit, see *Ex parte United States,* 101 F. 2d 870, 878 (CA7 1939), aff'd by an equally divided Court, *United States* v. *Stone,* 308 U. S. 519 (1939); *United States* v. *Standard Oil Co.,* 23 F. Supp. 937, 938–939 (WD Wis. 1938); cf. *State* v. *Meen,* 171 Wis. 36, 38–39 (1920); and even the power of an *appellate* court to reverse a district court's denial of a motion for directed verdict, see *Nosowitz, supra,* at 578; *Cherry* v. *United States,* 78 F. 2d 334 (CA7 1935); *Reiner* v. *United States,* 92 F. 2d 823, 824–825 (CA9 1937); *France* v. *United States,* 164 U. S. 676, 680 (1897); *Romano* v. *United States,* 9 F. 2d 522, 524 (CA2 1925). Not a single pre-Rule case cited by the dissent purports to exercise the power at issue here: a *district court's* power to enter *judgment of acquittal* for insufficient evidence, *without motion,* and *after the return of a guilty*

The case law of this Court that petitioner relies upon does not establish any "inherent power" to act in contravention of applicable Rules. In *Gaca* v. *United States*, 411 U. S. 618 (1973) *(per curiam)*, which reinstated an appeal that had been dismissed for want of timely prosecution, there was no suggestion that reinstatement was contrary to any statute or rule of procedure. And in *United States* v. *Nobles*, 422 U. S. 225 (1975), which approved exercise of a District Court's inherent authority to order the disclosure of certain witness statements, we felt it necessary to make sure that such exercise did not conflict with Federal Rule of Criminal Procedure 16. Petitioner's best case is *Thompson* v. *INS*, 375 U. S. 384 (1964), which, contrary to former Federal Rule of Civil Procedure 73(a), gave effect to a notice of appeal filed more than 60 days from the entry of judgment. *Thompson*, however, is not pertinent here, since it expressly relied upon the "'unique circumstances'" that the cause of the failure to meet the Rule's deadline was an erroneous ruling or assurance by the District Court itself. 375 U. S., at 387 (quoting *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215, 217 (1962) *(per curiam)*).

IV

Petitioner's three remaining arguments need not detain us long. First, he argues that the District Court had power to enter a judgment of acquittal in this case under the All Writs Act, 28 U. S. C. § 1651, through the writ of *coram nobis*. Apart from the fact that the District Court was not asked to

---

verdict. The dissent apparently thinks it an adequate explanation for this lack of support that, prior to our decision in *United States* v. *Smith*, 331 U. S. 469, 474 (1947) (suggesting that *sua sponte* grant of a new trial may raise double jeopardy concerns), district courts could order new trials where there was insufficient evidence to sustain the jury verdict. *Post*, at 442–443. But if these district courts truly had latent inherent power to enter a judgment of acquittal, surely at least *some* of them would have been willing to give a legally innocent defendant that to which he was entitled—viz., a judgment of acquittal—rather than just a new trial.

issue, and did not purport to be issuing, a writ of *coram nobis,* that writ would not have lain here, since it was traditionally available only to bring before the court factual errors "material to the validity and regularity of the legal proceeding itself," such as the defendant's being under age or having died before the verdict. See *United States* v. *Mayer,* 235 U. S. 55, 67–68 (1914). Moreover, "[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pennsylvania Bureau of Correction* v. *United States Marshals Service,* 474 U. S. 34, 43 (1985). As we noted a few years after enactment of the Federal Rules of Criminal Procedure, "it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate." *United States* v. *Smith,* 331 U. S., at 475, n. 4. In the present case, Rule 29 provides the applicable law.

Second, petitioner asserts that the failure to allow the District Court to enter a judgment of acquittal would violate the Due Process Clause of the Fifth Amendment. His argument on this point consists of nothing more than bald assertions that Rule 29(c) as applied to the facts of this case transgresses principles of fundamental fairness, "shocks the conscience," and interferes with rights "implicit in the concept of ordered liberty." Brief for Petitioner 28–29 (internal quotation marks omitted) (citing *Herrera* v. *Collins,* 506 U. S. 390 (1993); *Rochin* v. *California,* 342 U. S. 165, 172 (1952); *Palko* v. *Connecticut,* 302 U. S. 319, 325–326 (1937)). Petitioner has failed to proffer any historical, textual, or controlling precedential support for his argument that the inability of a district court to grant an untimely postverdict motion for judgment of acquittal violates the Fifth Amendment, and we decline to fashion a new due process right out of thin air.

Third, petitioner argues that prohibiting a district court from granting a motion for judgment of acquittal filed one day late will lead to needless appeals and habeas corpus proceedings, where it will be more difficult for defendants to obtain relief than in motions directed to the trial court. Assuming, *arguendo*, that these contentions are accurate, we cannot permit them to alter our analysis, for we are not at liberty to ignore the mandate of Rule 29 in order to obtain "optimal" policy results. Cf. *United States* v. *Robinson*, 361 U. S. 220, 229–230 (1960). We are similarly unmoved by petitioner's contention that the "rationale" behind Rule 29(c)'s time limit does not apply where the motion for judgment of acquittal is filed a mere eight days after the trial. The only evident "rationale" behind Rule 29(c)'s 7-day time limit is that a motion for judgment of acquittal filed eight days after trial is a motion filed one day later than justice and equity demand. As we said in a case involving the filing deadline of the Federal Land Policy and Management Act of 1976, 43 U. S. C. § 1744 (1988 ed.): "If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it." *United States* v. *Locke*, 471 U. S. 84, 101 (1985).

V

Finally, we may respond to some of the many arguments put forward by the dissent. The dissent makes the sweeping assertion that "a district court clearly has the inherent authority to ensure that a legally innocent defendant is not wrongfully convicted," *post*, at 442. Perhaps so. As the dissent itself recognizes, however, that power has come to an end once an appeal has been taken. *Post*, at 452–453. We are in accord, then, that there is *some* point at which the district court is rendered powerless to enter a judgment of acquittal, and the disagreement between us and the dissent comes down to nothing more cosmic than the question of timing—which we find answered by the text of Rule 29.

In an effort to explain why, if a Rule 29(c) motion is in any event unnecessary, it makes any sense to impose a 7-day *deadline* upon the making of it, the dissent maintains that the untimeliness of a motion gives a district court discretion to ignore it. *Post,* at 445. This presents the disedifying prospect of a court vested with "the inherent authority to ensure that a legally innocent defendant is not wrongfully convicted," *post,* at 442, exercising its discretion to let an innocent defendant be wrongfully convicted. Quite obviously, this explanation of the deadline is incompatible with the premise that underlies the dissent's entire argument. As for the dissent's concern, *post,* at 448, that our decision runs afoul of Rule 2's mandate that the rules "be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay": We see neither simplicity, nor fairness, nor elimination of delay in a regime that makes it discretionary whether an untimely motion for judgment of acquittal will be entertained.

The dissent asserts that "permissive rules do not withdraw pre-existing inherent powers." *Post,* at 452. That assertion is really not relevant to the present case since, as we have discussed, the power to enter postverdict judgments of acquittal *sua sponte* was not a "pre-existing inherent power." See *supra,* at 426–428, and n. 5. But besides the lack of factual predicate for its application here, the principle the dissent proposes would produce some extraordinary consequences. For example, as the cases cited by the dissent illustrate, see *post,* at 439–440, courts previously have ordered new trials *sua sponte.* Federal Rule of Criminal Procedure 33, however, provides that "[t]he court on motion of a defendant *may* grant a new trial . . . ." Following the dissent's logic, Rule 33, being permissive, does not preclude a court from granting a new trial without motion, thereby leaving open to the court a course of action that may well violate the Double Jeopardy Clause. But see Advisory Committee's Notes on 1966 Amendment of Fed. Rule Crim. Proc. 33, 18 U. S. C. App., p. 801 ("The amendments to the first two sentences make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of double jeopardy arise when the court acts on its own motion"). Similarly, a pre-existing practice, if there was one, would allow a subpoena to be served by a party or a minor despite Federal Rule of Criminal Procedure 17(d) ("A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age"); would allow a judge from another district to take over a jury trial from a disabled judge despite Federal Rule of Criminal Procedure 25(a) ("If . . . the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court . . . may proceed with and finish the trial"); and would allow a court to correct a technical error in a sentence more than seven days after the imposition of the sentence, despite Federal Rule of Criminal Procedure 35(c) ("The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error").

The decisions of Justice Harlan relied upon by the dissent to support the proposition that permissive rules do not eliminate inherent powers are not germane. We have discussed *Link* above, see *supra*, at 426. In *United States* v. *Ohio Power Co.*, 353 U. S. 98, 104 (1957), Justice Harlan noted that this Court has proceeded on the assumption that we have inherent authority to "affect judgments by action which would otherwise be out of time under [our own] Rules." That statement would be relevant if the present case involved a district court's departure from one of its own rules—which of course it does not. In *Fernandez* v. *United*

States, 81 S. Ct. 642 (1961), 5 L. Ed. 2d 683 (Harlan, J., in chambers), Justice Harlan recognized that the provision of former Federal Rule of Criminal Procedure 46(a) that a "person arrested for an offense not punishable by death shall be *admitted* to bail" (emphasis added) did not withdraw district courts' authority to *revoke* bail in a noncapital case. *Fernandez, supra,* at 644, and n. 7, 5 L. Ed. 2d, at 685, and n. 7. What admitting to bail implies with respect to revocation of bail is not comparable to what granting judgment on motion implies with respect to granting judgment without motion. What the dissent needs, in the *Fernandez* context, is a case holding that a statute which permits bail for "persons arrested for noncapital offenses" does not preclude bail for persons arrested for capital offenses. Of course, such a case will not be found.

Finally, the dissent contends that *United States* v. *Sisson,* 399 U. S. 267 (1970), supports existence of the "inherent power" petitioner invokes. See *post,* at 448–449. We think not. *Sisson* did *not* "implicitly conclude" that it was proper to enter a postverdict judgment of acquittal without motion, because the *propriety* of the judgment of acquittal was irrelevant to the decision. The only issue was whether the judgment appealed from *was* a judgment of acquittal (proper *or* improper), because that would mean that the Government's appeal under the former 18 U. S. C. § 3731 (which did not apply to judgments of acquittal) must be dismissed. See *United States* v. *Wilson,* 420 U. S. 332, 351 (1975) (appeal in *Sisson* "was barred solely by the statute").

* * *

We conclude that the District Court had no authority to grant petitioner's motion for judgment of acquittal filed one day outside the time limit prescribed by Rule 29(c). We therefore affirm the judgment of the Sixth Circuit.

It is so ordered.

JUSTICE SOUTER, concurring.

In Part I of his dissenting opinion, JUSTICE STEVENS makes a persuasive argument that, absent a rule to the contrary, district judges have an "inherent authority" to enter a judgment of acquittal, although, for the reasons offered by the majority, *ante*, at 426, I am not persuaded that this inherent authority extends to the power to act *sua sponte* to grant a judgment of acquittal after the jury has returned a verdict. In any event, I accept the received view that inherent power generally is subject to legislative abrogation, see *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 254–255 (1988); *ante*, at 426, and although Congress's power is not necessarily plenary, its limits are not implicated here. While there may be some point at which legislative interference with a court's inherent authority would run afoul of Article III, see *Chambers* v. *NASCO, Inc.*, 501 U. S. 32, 58 (1991) (SCALIA, J., dissenting) ("Some elements of that inherent authority are so essential to '[t]he judicial Power,' U. S. Const., Art. III, § 1, that they are indefeasible"), it is not seriously contended that Rule 29(c) is an unconstitutional interference with the court's inherent authority. I therefore join the Court's opinion.

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring.

I join the opinion of the Court and highlight features of the case key to my judgment.

It is anomalous to classify time prescriptions, even rigid ones,* under the heading "subject matter jurisdiction." That most basic requirement relates to the subject matter of the case or controversy or the status of the parties to it. See 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3522, p. 78 (2d ed. 1984); Restatement (Second) of Judgments § 11 (1982) (defining "subject matter jurisdiction" as the "authority [of the court] to adjudicate the type of controversy involved in the action"); cf. *United States* v. *Kember,* 648 F. 2d 1354, 1357–1358 (CADC 1980) *(per curiam)* (commenting on "manifold settings in which we employ the term [jurisdiction]" and distinguishing fundamental "jurisdiction" questions from issues of a less basic character); *Center for Nuclear Responsibility, Inc.* v. *United States Nuclear Regulatory Comm'n,* 781 F. 2d 935, 945, n. 4 (CADC 1986) (Ginsburg, J., dissenting) (questioning "profligate use" of the word "jurisdiction," in diverse contexts, "to mean many things—from the absence of a constitutional grant of judicial power to a statutory limit on time to appeal").

---

*See Fed. Rule Crim. Proc. 45(b) (listing time rules that are not subject to enlargement for "cause shown").

Federal Rule of Criminal Procedure 29(c) concerns a matter less basic. It is simply a time prescription. Rule 29(c)'s prescription is a tight one, to be sure. Federal Rule of Criminal Procedure 45(b) makes that clear by precluding extensions, even for "excusable neglect," after expiration of the seven days specified in Rule 29(c). But like limitation periods generally, see, *e. g., Irwin* v. *Department of Veterans Affairs,* 498 U. S. 89, 95 (1990) ("[t]ime requirements in lawsuits . . . are customarily subject to 'equitable tolling' "), the 29(c)/45(b) constraint is not utterly exceptionless.

This Court has recognized one sharply honed exception to rules of the 29(c)/45(b) genre. That exception covers cases in which the trial judge has misled a party who could have—and probably would have—taken timely action had the trial judge conveyed correct, rather than incorrect, information. See *Thompson* v. *INS,* 375 U. S. 384, 386–387 (1964) *(per curiam)* (had trial judge not misinformed party that his new trial motion was made "in ample time," party "could have, and presumably would have, filed the appeal within 60 days of the entry of the original judgment, rather than waiting, as he did, until after the trial court had disposed of the [new trial motion]"); *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.,* 371 U. S. 215, 216–217 (1962) *(per curiam)* (instructing that petitioner's appeal be heard on the merits where petitioner had received from trial court an improperly grounded 14-day extension of the time to file his appeal); see also 4A Wright & Miller, Federal Practice and Procedure § 1168, at 501 (describing *Thompson* and *Harris Truck Lines* as "based on a theory similar to estoppel"). As the Court observes, however, this exception "is not pertinent here." See *ante*, at 428.

Carlisle's counsel was not misled by any trial court statement or action; rather, he neglected to follow plain instructions. Rule 29(c) clearly instructs that a motion for a judgment of acquittal be filed "within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Just as clearly, Rule 45(b) excludes motions for enlargement once seven days have run. I agree that a rule like 29(c) is framed to resist ad hoc relaxation. A time line must be drawn at some point, and it is not unreasonable to draw the line as the rulemakers did, rather than extend it out to the day set for sentencing.

It bears emphasis, finally, that the Government recognizes legal avenues still open to Carlisle to challenge the sufficiency of the evidence to warrant his conviction: on appeal (subject to "plain error" standard); and through a postconviction motion, under 28 U. S. C. § 2255, asserting ineffective assistance of counsel. Brief for United States 38–39. In the rare situations JUSTICE STEVENS envisions—delay of a meritorious motion due to an Act of God, see *post*, at 454, or cases comparable to those in which we would read and grant an out-of-time rehearing petition, see *post*, at 450–451—these modes of relief should provide an adequate corrective.

JUSTICE STEVENS, with whom JUSTICE KENNEDY joins, dissenting.

As long as a federal court retains jurisdiction over a criminal case, it has the authority to ensure that no conviction is entered unless the prosecutor has proved the defendant's guilt. The exercise of the court's inherent power to set aside a jury verdict unsupported by evidence is not contingent on the filing of a timely motion by the defendant. The question in this case, therefore, is not whether Rule 29 of the Federal Rules of Criminal Procedure *authorizes* the court to grant an untimely motion for judgment of acquittal; I agree with the Court that it does not. Rather, the question is whether that Rule *withdraws* the court's pre-existing authority to refrain from entering judgment of conviction against a defendant whom it knows to be legally innocent.

Viewed in this light, the majority places more reliance on the negative implication in Rule 29 than its permissive language can bear. Assuming it exists at all, this negative implication is far too weak to justify the conclusion that Rule 29 manifests that Congress desired to withdraw a federal court's inherent authority to acquit an innocent defendant.

I

Trial judges are kept busy responding to motions, objections, and requests by the litigants. It is quite wrong, however, to assume that a judge is nothing more than a referee whose authority is limited to granting or denying motions advanced by the parties. As Learned Hand tersely noted, a "judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary." *Brown* v. *Walter*, 62 F. 2d 798, 799 (CA2 1933). That duty encompasses not only the avoidance of error before it occurs, but the correction of error that may have occurred earlier in a proceeding.

The basic principle has been stated many times. There is a "power 'inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.' *Arkadelphia Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 146. See *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 219." *United States* v. *Morgan*, 307 U. S. 183, 197 (1939). Although that statement was made in a civil case, we have made it clear that a federal court has even broader discretion to notice error independently in the trial of a criminal case than in civil cases. *Crawford* v. *United States*, 212 U. S. 183, 194 (1909).

Examples of the exercise of the federal courts' inherent powers are abundant in both our civil and our criminal jurisprudence.[1] Indeed, when he was serving on the Court of Appeals for the Ninth Circuit, then-Judge Kennedy, after considering a series of cases that recognized various inherent judicial powers,[2] correctly pointed out:

---

[1] A few examples illustrate the breadth of that power. We have held that a district court "has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens,*" *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 502 (1947); to dismiss an appeal in a criminal case if the defendant is a fugitive, *Molinaro* v. *New Jersey*, 396 U. S. 365, 366 (1970); to enforce compliance with lawful orders through civil contempt, *Shillitani* v. *United States*, 384 U. S. 364, 370 (1966); to order special conferences that will aid in the disposition of a complex antitrust case, *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 81 (1950); and to stay proceedings "to control the progress of the cause so as to maintain the orderly processes of justice," *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, 381–382 (1935). We have also recognized the court's inherent power to enforce its judgments, see *Peacock* v. *Thomas*, 516 U. S. 349 (1996), as well as its inherent power to award attorney's fees in exceptional cases, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 256 (1975).

[2] "*E. g., Roadway Express, Inc.* v. *Piper*, 447 U. S. 752, 764–67 . . . (1980) (assessing costs against parties or attorneys); *Cooke* v. *United States*, 267 U. S. 517, 534 . . . (1925) (contempt power); *United States* v. *Armstrong*, 621 F. 2d 951, 954–55 (9th Cir. 1980) (allowing inspection of property belonging to third parties); *Franquez* v. *United States*, 604 F. 2d 1239 (9th Cir. 1979) (ordering jury trial on an issue when not contemplated by statute); *In re Sealed Affidavit(s) to Search Warrants (Agosto)*, 600 F. 2d 1256 (9th Cir. 1979) (sealing papers filed with the court); *United States* v. *Simmons*, 536 F. 2d 827, 832–34 (9th Cir.), *cert. denied*, 429 U. S. 854 . . . (1976) (dismissal for want of prosecution); *United States* v. *Malcolm*, 475 F. 2d 420 (9th Cir. 1973) (ordering a defendant to undergo a psychiatric exam)." *Arizona* v. *Manypenny*, 672 F. 2d 761, 765 (CA9 1982).

> "Exercise of judicial power by entry of orders not expressly sanctioned by rule or statute in order to correct the legal process or avert its misfunction has been approved in varied circumstances." *Arizona* v. *Manypenny,* 672 F. 2d 761, 765, cert. denied, 459 U. S. 850 (1982).

When a federal court declines to enter a judgment of conviction against a defendant whom it should have directed the jury to acquit, it clearly corrects the legal process and averts its misfunctioning. Given the various *sua sponte* powers that district courts unquestionably may exercise in order to ensure that legally innocent defendants are not convicted, it is clear that they also possess the inherent authority *sua sponte* to enter postverdict acquittals when the Government has failed to prove that a defendant is guilty.

District courts have long exercised their inherent power to direct an acquittal *sua sponte* when the prosecution fails to prove its case at the close of evidence. See *Wiborg* v. *United States,* 163 U. S. 632, 659 (1896); *Cady* v. *United States,* 293 F. 829 (CADC 1923); *Nosowitz* v. *United States,* 282 F. 575, 578 (CA2 1922).[3] They have also long exercised their inherent power to set aside a jury verdict for insufficiency of the evidence *sua sponte.* See *United States* v. *Harding,* 26 F. Cas. 131, 136 (No. 15,301) (ED Pa. 1846); *United States* v. *Fullerton,* 25 F. Cas. 1225 (No. 15,176) (SDNY 1870); see also F. Wharton, Criminal Law of the United States 669 (1846) ("Where, however, evidence is not sufficient in law to authorize a verdict, a new trial will be granted, even though no objection be made at the trial"); *id.,* at 643*(s)* (explaining that the judge reserves "it to himself, if there be an improper conviction, to arrest the judgment or set aside the verdict"); *Charles* v. *State,* 4 Port. 107, 109–110 (Ala. 1836).[4]

---

[3] Indeed, *Cady* referred to "the well-established and oft-repeated principle that, unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, *it is the duty of the trial court to instruct the jury to return a verdict for the accused . . . .*" 293 F., at 830 (emphasis added). Moreover, in both of the cases cited by the majority as supporting the existence of the power exercised here, *United States* v. *McCracken,* 26 F. Cas. 1069 (No. 15,664) (ED Va. 1878), and *United States* v. *Hayden,* 26 F. Cas. 236, 238 (No. 15,333) (NDNY 1877), see *ante,* at 426–427, the district judges directed the jury to return a verdict of not guilty. In the *Hayden* case, the court went on to describe what I assume was the settled practice among all federal judges at the time: "I have made it a rule to direct a verdict of not guilty where, in my opinion the evidence will not authorize the jury to find a verdict of guilty, or, if so found, I would set aside the verdict as contrary to evidence. I think this is a case of that class, and I therefore direct the jury to find a verdict of not guilty." 26 F. Cas., at 238.

The District Courts' longstanding exercise of these inherent powers is entirely consistent with the conclusion that a district court acts within its power when it enters a judgment of acquittal upon setting aside an unsupported jury verdict. To be sure, the early cases reveal that District Courts typically ordered new trials, rather than acquittals, upon concluding that the jury's verdict was not supported by legally sufficient evidence. However, subsequent cases demonstrate that as courts became concerned that the new trial remedy trenched on the prohibition against double jeopardy, they began to enter judgments of acquittals. See *Ex parte United States*, 101 F. 2d 870, 878 (CA7 1939), aff'd by an equally divided Court in *United States* v. *Stone*, 308 U. S. 519 (1939).

---

[4] Out of deference to the King, the rule was apparently different in England. See 1 J. Stephen, A History of the Criminal Law of England 312–313 (1883); but cf. 3 W. Blackstone, Commentaries *389–*390. Even still, English judges evaded the procedural bar by declining to enter sentence and requesting the Crown to pardon wrongfully convicted defendants. These requests were routinely granted. See *Ex parte United States,* 101 F. 2d 870, 875, n. 15 (CA7 1939). Judge Kane explained that he did "not remember to have read of a single instance in which the judicial recommendation has been disregarded by the ministers of the crown, and [he did] not suppose that it could be without a breach of the constitution of the realm." *United States* v. *Harding,* 26 F. Cas. 131, 137 (No. 15,301) (ED Pa. 1846). As a result of this consistent practice, he concluded that "[i]n England, therefore, the denial to the courts of a revisory power over verdicts in any cases is apparent, rather than real. The judge, if dissatisfied with a conviction on the merits, respites the sentence or reprieves the prisoner, and the king's prerogative interposes to do justice as a thing of course." *Ibid.*

The earliest cases involve appellate courts entering judgments of acquittal in order to remedy a district court's failure to direct the jury to acquit. See *Nosowitz* v. *United States*, 282 F. 575 (CA2 1922); *Cherry* v. *United States*, 78 F. 2d 334 (CA7 1935); *Reiner* v. *United States*, 92 F. 2d 823 (CA9 1937); see also *France* v. *United States*, 164 U. S. 676 (1897) (remanding to the District Court with directions to enter such judgment); *Romano* v. *United States*, 9 F. 2d 522 (CA2 1925) (same). Later cases reveal that District Courts soon followed suit, either by ruling on reserved, preverdict acquittal motions or by granting postverdict motions to acquit. See *Ex parte United States*, 101 F. 2d 870 (CA7 1939); *United States* v. *Standard Oil Co.*, 23 F. Supp. 937 (WD Wis. 1938), aff'd in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 165, n. 1 (1940); *State* v. *Meen*, 171 Wis. 36 (1920) (same); see also Advisory Committee's Notes to Rule 29 (endorsing these practices). Moreover, prior to the adoption of Rule 29 in 1944, the Fifth Circuit explained that, even after a jury returns a verdict, a court "may and should" *sua sponte* review the sufficiency of the evidence. *Ansley* v. *United States*, 135 F. 2d 207, 208 (1943).

In light of this history, it makes no sense to conclude that a federal district court lacks the inherent power to enter *sua sponte* a postverdict judgment of acquittal. A trial court's postverdict entry of a judgment of acquittal is in substance no different from an appellate court's order directing entry of that same judgment. Moreover, the double jeopardy concerns that may bar a district court from ordering a new trial to remedy its failure to have directed an acquittal cannot sensibly be understood to prohibit the district court from providing a defendant some measure of relief from a legally insufficient guilty verdict. See *United States* v. *Smith,* 331 U. S. 469, 474 (1947). Finally, given that a motion was not thought to be needed in order for the District Court to exercise its inherent power either to direct an acquittal, or to set aside an unsupported verdict and order a new trial, there is no reason to conclude that a district court is utterly powerless to remedy a wrongful conviction in the exceedingly rare circumstance in which an unforeseen accident results in the defendant's failure to file a motion for acquittal.

In all events, a district court clearly has the inherent authority to ensure that a legally innocent defendant is not wrongfully convicted. It would be most strange to conclude that this authority, which enables a district court to keep a case from the jury altogether when the Government fails to prove its case, does not permit that same court to revise a guilty verdict that the jury returns despite the Government's insufficient proof. That conclusion is particularly difficult to fathom when one considers that the latter action may be appealed by the Government, while the former may not. *United States* v. *Wilson,* 420 U. S. 332, 345 (1975). Not surprisingly, therefore, numerous courts have recognized that, prior to the passage of Rule 29, district courts possessed the inherent power to acquit defendants *sua sponte.* See *United States* v. *Hughes,* 759 F. Supp. 530, 532–536 (WD Ark.), aff'd *sub nom. United States* v. *Haren,* 952 F. 2d 190 (CA8 1991); *United States* v. *DiBernardo,* 880 F. 2d 1216, 1225, n. 4 (CA11 1989); *United States* v. *Coleman,* 811 F. 2d 804 (CA3 1987); *United States* v. *Giampa,* 758 F. 2d 928, 936, n. 1 (CA3 1985); *Arizona* v. *Manypenny,* 672 F. 2d, at 765; *Ansley* v. *United States,* 135 F. 2d, at 208; see also *United States* v. *Weinstein,* 452 F. 2d 704, 713, 714 (CA2 1971); *United States* v. *Broadus,* 664 F. Supp. 592, 595–598 (DC 1987).

The majority states that no pre-Rule case establishes the precise power at issue here. *Ante,* at 427–428, n. 5. That is true but unremarkable. The majority does not dispute that, prior to the passage of Rule 29, trial courts possessed the inherent power to remedy unsupported guilty verdicts by ordering new trials *sua sponte.* After Rule 29 was adopted, this Court pointed out the double jeopardy concerns raised by the *sua sponte* exercise of the new trial remedy. See *United States* v. *Smith,* 331 U. S., at 474. Since that time, numerous cases have concluded that courts may remedy unsupported jury verdicts by entering judgments of acquittal. The majority offers no principled reason for concluding that this more recent remedy is beyond the power of district courts, even though the prior remedy was not.

In sum, the error-correcting power that is "'inherent in every court of justice so long as it retains control of the subject matter and of the parties,'" *Morgan,* 307 U. S., at 197, encompasses the kind of error at issue in this case. Therefore, absent some express indication that Congress intended to withdraw the power that implicitly attends its initial grant of jurisdiction, a district court acts well within its discretion when it sets aside a jury verdict and acquits a defendant because the prosecution failed to prove its case.

II

Because the Acts of Congress investing federal judges with jurisdiction to try criminal cases are the source of a district court's power to set aside unsupported jury verdicts, I have no occasion to disagree with the Court's view that petitioner errs in relying on Rule 29 as the source of the District Court's authority in this case. I do, however, strongly disagree with the Court's own reliance on that Rule for the quite different conclusion that it clearly prohibits the power exercised by the District Court here.

In Part III of its opinion, the majority asserts that the District Court's action "contradicted the plain language of Rule 29(c), and effectively annulled the 7-day filing limit," *ante,* at 426, and that "the clarity of the text" suffices to prohibit the District Court's action, *ibid.* The majority assumes that these conclusory assertions follow implicitly from its determination in Part II of its opinion that Rule 29 does not authorize the District Court to set aside a jury verdict *sua sponte.*

In my view, the Rule serves three salutary purposes that are in no tension with a district court's inherent power to enter a judgment of acquittal *sua sponte.* None of these purposes would be frustrated if the Rule were understood to coexist with, though not to authorize, a district court's power to avoid imposing sentence on an innocent defendant in the truly exceptional case in which evidence of guilt is wholly lacking.

First, subdivision (a) confirms the view that a judge has a duty to direct an acquittal if the prosecution has failed to prove its case at the close of evidence. The Rule's affirmation of that duty is in no way inconsistent with a court's exercise of its postverdict power to enter *sua sponte* a judgment of acquittal. As then-Judge Kennedy explained for the Ninth Circuit in *Arizona* v. *Manypenny,* 672 F. 2d, at 764: "We do not read the mention in Rule 29(a) of a court granting such a judgment 'on its own motion' before submission to a jury as an elimination of a court's inherent power to grant such a judgment after submission to the jury."

Second, subdivision (b) accommodates the defendant's right to move for a directed acquittal with the Government's right to seek appellate review. Indeed, the subdivision was amended in 1994 for the very purpose of striking a more proper balance between those two interests. See Advisory Committee's Notes to Fed. Rule Crim. Proc. 29(b), 18 U. S. C. App., pp. 784–785. As a result, a district court's *sua sponte* decision to acquit after the jury returns a guilty verdict can hardly be said to undermine the purpose of subdivision (b). The defendant's interests are obviously fully protected by an acquittal, while the Government's right to appeal is protected because the jury has already returned its verdict of guilt. See *United States* v. *Wilson,* 420 U. S., at 345.[5]

Third, subdivision (c) requires defense counsel to file the postverdict motion for judgment of acquittal promptly, while the trial judge presumably retains a firm recollection of the evidence and therefore is able to rule expeditiously and efficiently. The untimeliness of a later motion provides the judge with a sufficient reason for denying it without even reading it or reviewing the transcript. Thus, a judge's entirely discretionary decision to enter *sua sponte* an acquittal after the 7-day period in no way annuls the 7-day deadline. Defendants are still bound by that time limitation, and the Rule thus serves the useful function of limiting a defendant's right to require a judge to reconsider the sufficiency of the evidence. As then-Judge Kennedy explained: "Rule 29(c) creates a deadline by which defendants must present motions for judgment of acquittal to the court; it does not address the court's inherent power to grant such a judgment." *Arizona* v. *Manypenny,* 672 F. 2d, at 764.

---

[5] The majority is also wrong to contend that it would make a "farce" of subdivision (b) to construe it to permit judges to act *sua sponte. Ante,* at 422. There are sound reasons for setting forth regulations concerning a court's power to reserve a defense motion that it must entertain even if the court also possesses the entirely discretionary power to acquit at any time on its own initiative as long as it possesses jurisdiction over the case. For example, the new Rule 29(b) makes clear that the district court, even if it reserves a motion for acquittal filed after the prosecution's case in chief, may not consider any evidence submitted thereafter in disposing of the motion. That limitation on the district court's authority protects a defendant's right to make a motion for acquittal and to put on rebuttal evidence without risking that new evidence of guilt will emerge. Such a protection serves a useful function even though in the absence of a motion to acquit a court would have the discretionary power to enter judgment in the defendant's favor. Thus, it is simply not true that there "would be no need" for the procedures set forth in Rule 29(b) if, "even without reserving, the court had continuing power to grant judgment of acquittal on its own." *Ibid.*

The majority nevertheless maintains that the Rule must be read to require judges, in some instances, to enter judgments of conviction against defendants they know to be innocent. The majority does not argue that Rule 29 *expressly* prohibits a district court from acting on its own to set aside an unsupported jury verdict. Rather, it relies solely on the negative inference that it draws from the absence of three words in one sentence of Rule 29(c). *Ante,* at 423.[6] Specifically, the majority seizes upon the "notabl[e] absen[ce]" of the phrase "on such motion" in the third sentence of the Rule, *ibid.,* and concludes that this omission "convey[s] the idea that, where a jury has not returned a verdict, a court can act without motion, but where a jury has returned a guilty verdict, it cannot," *ibid.*

In light of the pre-Rule precedent establishing a district court's inherent power to review *sua sponte* a jury verdict for sufficiency of the evidence, see *Ansley* v. *United States,* 135 F. 2d, at 208, the majority reads far too much into the omission. The caption to Rule 29(c) makes clear that the subdivision only contemplates judicial action taken in response to a motion. The first sentence explains that a motion may be made after a jury's discharge whether or not a guilty verdict has been returned. The next sentence sets forth the action that the district court may take when such a motion is filed after the jury returns a guilty verdict. In a similar vein, the third sentence sets forth the action that the district court may take when no verdict has been returned. The omission of the words "on such motion" from the third sentence surely just reflects a draftsman's sensible decision to avoid a patent redundancy rather than a cryptic intent to change the law by prohibiting a judge from exercising his or her inherent power to enter a judgment of acquittal.[7]

---

[6] Rule 29(c) reads as follows:

"(c) MOTION AFTER DISCHARGE OF JURY. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

Common sense refutes what the text fails to compel. Under the majority's reading, Rule 29(c) establishes a most inefficient regime for setting aside unsupported jury verdicts by requiring defendants to file appeals and collateral challenges to judgments of conviction that district judges knew to be unsupported. Given that Federal Rule of Criminal

---

[7] The inclusion of the phrase "on such motion" in the second sentence of Rule 29(c) is no mystery. Unlike the present Rule, the original version of Rule 29 permitted the defendant to move either for a new trial or for an acquittal after the jury had been discharged. The next sentences of the original Rule stated that the district court was authorized to grant either a new trial or an acquittal whether or not the jury returned a verdict. The inclusion of the phrase "on such motion" was necessary in order to make clear that the judge could not order a new trial unless the defendant first requested one.

Contrary to the majority's construction of the relevant language, there is no reason to suppose that the phrase "on such motion" in the old Rule applied only to the circumstance in which the jury returned a verdict. Under such a construction, the original Rule would have been intended to "conve[y] the idea," *ante*, at 423, that the District Court possessed the authority to impose a new trial against the defendant's wishes whenever the jury had been discharged without having returned a verdict. It is clear that the drafters never intended to convey such a potentially unconstitutional idea. Indeed, it was the drafters' concern that the original Rule might be subject to the potentially unconstitutional "interpretation that a motion for judgment of acquittal gives the court power to order a new trial even though the defendant does not a wish a new trial and has not asked for one" that led them to eliminate all references to new trial orders in what is now Rule 29(c). Advisory Committee's Notes on Fed. Rule Crim. Proc. 29, 18 U. S. C. App., pp. 784–785. There is no hint in the Advisory Committee's Notes, or the Rule's drafting history, that this limiting revision was simultaneously intended to link the district court's power to acquit for insufficiency of the evidence with the jury's return of a verdict.

Procedure 2 directs that the rules "shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay," there is no reason to read the ambiguity in Rule 29(c) to prohibit a district court from correcting a plain error that would otherwise be challenged in a subsequent court proceeding.[8]

Indeed, our decision in *United States* v. *Sisson*, 399 U. S. 267 (1970), reveals that when we previously considered Rule 29 we did not understand it to prohibit a district court from *sua sponte* entering a postverdict judgment of acquittal. There, defendant's counsel moved postverdict to arrest judgment under Federal Rule of Criminal Procedure 34. 399 U. S., at 276. The District Court purported to grant the Rule 34 motion on evidentiary and constitutional grounds that the defendant's motion did not raise. *Id.*, at 277, n. 6. The Government sought review from this Court pursuant to 18 U. S. C. § 3731, which at that time permitted governmental appeals from orders arresting judgment but not from orders entering judgments of acquittal. 399 U. S., at 279–280.

In holding that we lacked jurisdiction to hear the Government's appeal, we explained that although the District Court termed its order an "arres[t] [of] judgment," it was in fact an acquittal. *Id.*, at 288. The portion of Justice Harlan's opinion that five Members of the Court joined equated the District Court's *sua sponte* acquittal with an acquittal by a jury. As support for the comparison, the opinion explained that, under Rule 29, "judges, like juries, can acquit defendants." *Id.*, at 290. Moreover, it noted that Rules 29(b) and

---

[8] The majority dismisses these concerns by suggesting that because we agree that a district court lacks the power to enter a judgment of acquittal after an appeal is taken, we disagree only as to "timing." *Ante*, at 431. In truth, our point of disagreement is more fundamental. It concerns the power of a court to correct a miscarriage of justice while it retains jurisdiction over a case. Because an appeal can only be taken once a judgment has been entered, the real issue that divides us is whether the Federal Rules of Criminal Procedure compel a district court to enter a judgment of conviction against a defendant whom it knows to be innocent.

(c) of the Federal Rules of Criminal Procedure "expressly allow a federal judge to acquit a criminal defendant after the jury 'returns a verdict of guilty.'" *Ibid.;* see also *United States* v. *Weinstein,* 452 F. 2d, at 713, 714 (explaining that *Sisson* determined that the District Court in that case acted within its jurisdiction in entering the postverdict judgment of acquittal).

Although the merits of the judgment of acquittal were not before the Court in *Sisson,* the trial court's jurisdiction to enter the judgment plainly was. Just as a trial court's postjudgment acquittal could not have mooted a pending appeal, neither could a jurisdictionally barred action have prevented an appeal from being taken. Nevertheless, the *Sisson* Court did not identify any jurisdictional bar to the judge's entry of a postverdict acquittal motion, even though no Rule 29 motion had been filed. I am therefore mystified as to why the Court now concludes that the Rule can only be read to deprive the district court of jurisdiction to acquit postverdict in the absence of a defendant's motion.

Our prior construction of procedural rules that employ permissive language similar to that used in Rule 29 reinforces the implicit conclusion that we reached in *Sisson.* As we recently explained, our prior cases reveal that although Congress may limit the exercise of the inherent power of lower federal courts, "'we do not lightly assume that Congress has intended'" to do so. *Chambers* v. *NASCO, Inc.,* 501 U. S. 32, 47 (1991) (quoting *Weinberger* v. *Romero-Barcelo,* 456 U. S. 305, 313 (1982)). That interpretive principle suggests that something far more than an ambiguous silence is required to withdraw a district court's inherent power.

Link v. *Wabash R. Co.,* 370 U. S. 626 (1962), sets forth the proper analysis. In *Link,* we rejected the argument that the authority granted to a defendant by Rule 41 of the Rules of Civil Procedure to move for an involuntary dismissal of a complaint, by negative implication, precluded such a dismissal on the court's own motion. In his opinion for the Court, Justice Harlan explained:

> "We do not read Rule 41(b) as implying any such restriction. Neither the permissive language of the Rule—which merely authorizes a motion by the defendant—nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.*, at 630–631 (footnote omitted).[9]

Our practice with respect to petitions for rehearing is also instructive. Such petitions, like motions for a judgment of acquittal, are routinely filed and almost never granted. If not filed within the time specified in our Rules, it is appropriate to deny such a petition without even reading it. On rare occasions, however, we have held that the interest in the evenhanded administration of justice outweighs the interest in finality and granted such petitions even though untimely and even though there is not a word in our Rules that authorized such action.

---

[9] In an effort to distinguish *Link*, the Court asserts that the practice of setting aside insufficient jury verdicts in criminal cases is far less established than was the practice of dismissing cases for want of prosecution. It further contends that the "clarity of the text," *ante*, at 426, in this case renders the logic of *Link* inapplicable. *Link* cannot fairly be read to suggest that inherent powers of recent origin may be more easily withdrawn than those of older vintage. In any event, the court's inherent power to set aside criminal convictions unsupported by evidence has been long accepted. Finally, given that Justice Harlan authored both *Link* and *Sisson*, I find most unpersuasive the majority's conclusion that the "clarity of the text" in Rule 29 should occasion a different result from that reached in *Link*.

Thus, in *United States* v. *Ohio Power Co.*, 351 U. S. 980 (1956), the Court on its own initiative vacated an earlier order denying a petition for rehearing and, in the following Term, granted the previously denied petition. *United States* v. *Ohio Power Co.*, 353 U. S. 98 (1957). While Justice Harlan dissented from that disposition, he did not disagree with the proposition that "the Court's inherent power over its judgments" included the authority to take action that "would otherwise be out of time under the Rules." *Id.*, at 104.

Just three years after the *Ohio Power* decision, Justice Harlan had occasion to endorse the exercise of a District Court's use of its inherent powers in apparent conflict with the language of the Federal Rules of Criminal Procedure. Explaining his denial of an application for bail, he correctly observed that those Rules should not be construed to withdraw the District Court's inherent power to revoke bail during the course of a criminal trial. See *Fernandez* v. *United States*, 81 S. Ct. 642, 644, n. 7, 5 L. Ed. 2d 683, 685, n. 7 (1961) (in chambers). In doing so, he exposed the basic flaw in an argument comparable to the one accepted by the Court today.

Justice Harlan explained that even though Federal Rule of Criminal Procedure 46(a)(1) stated that a "'person arrested for an offense not punishable by death *shall* be admitted to bail,'" that Rule did not purport to withdraw the district courts' "authority, as an incident of their inherent powers to manage the conduct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trial and the fair administration of justice." *Fernandez* v. *United States*, 81 S. Ct., at 644, 645, n. 7, 5 L. Ed. 2d, at 685, n. 7, 686 (in chambers). He properly read the seemingly mandatory language of Rule 46(a)(1) against a pre-Rule legal background that afforded district courts a greater measure of discretion. *Ibid.;* see also *United States* v. *Anguilo,* 755 F. 2d 969, 972 (CA1 1985) (Breyer, J.). Given that Justice Harlan also authored *Link,* which holds that a procedural rule permitting a dismissal on motion does not preclude a dismissal without motion, I doubt that the majority's attempt to distinguish *Fernandez* would have been persuasive to its author.

Our decision in *United States* v. *Smith,* 331 U. S. 469 (1947), is consistent with our prior cases holding that permissive rules do not withdraw pre-existing inherent powers.[10] Although the majority contends that *Smith* supports the inference that the draftsmen of Rule 29 intended to limit the court's authority to take action in response to a timely motion by counsel, that case actually supports the proposition that the adoption of the Federal Rules of Criminal Procedure did not modify the pre-existing power of the district court to set aside an erroneous judgment while it retains jurisdiction of a case.

The error committed by Judge Smith was his attempt to assert jurisdiction in a criminal case after the *judgment* of conviction had been affirmed on appeal and even after the defendant had started to serve his sentence. There was not even an arguable basis for suggesting that the judge then had jurisdiction to order a new trial. *Id.,* at 474; see *United States* v. *Mayer,* 235 U. S. 55, 70 (1914).[11] The only theory that might have justified his action was his lawyer's argument that the Rules had expanded the District Court's jurisdiction beyond the end of the term of court in which the trial had been conducted. This Court's reasons for holding that the Rules did not enlarge that jurisdiction equally support the proposition that they did not diminish that jurisdiction either.

---

[10] That is not to say that permissive rules *establish* inherent powers. For that reason, the majority's recitation of various permissive rules for which no analogous inherent power exists is quite beside the point. *Ante,* at 431–432.

[11] As the Court pointed out in *United States* v. *Smith,* 331 U. S. 469 (1947), new trial orders are particularly problematic because they raise serious double jeopardy concerns. Of course, no such concerns are present here.

In fact, if one takes note of the extraordinary character of Judge Smith's attempt to set aside a conviction after it had been affirmed on appeal and after the defendant had been incarcerated for several months, it is easy to understand why Justice Jackson's opinion for the Court expressed concern that such action might give rise to an appearance of impropriety, and therefore provided us with the dictum concerning possible *ex parte* approaches to the judge on which today's majority relies. The suggestion that that dictum has any relevance to the period between the return of the jury's verdict and the imposition of sentence is not only misplaced, but also represents a highly inappropriate comment on the integrity of the federal judiciary. Judge Smith's singularly bizarre action a half century ago provides no basis for either the inference or the rule that today's majority thinks the *Smith* opinion supports. See *Arizona* v. *Manypenny,* 672 F. 2d, at 765, n. 10 (explaining that "*Smith* cannot be applied indiscriminately outside of the particular factual context at issue there").

The decision in *Smith* was a correct application of the principle that should control the disposition of this case. There is a "power 'inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.'" *United States* v. *Morgan,* 307 U. S., at 197. Of course, that power does not survive after the court's jurisdiction of the subject matter has expired. It is surely sufficient, however, to enable the judge to refuse to impose sentence on a defendant when the record does not contain evidence of guilt.

As a result, Rule 29(c) is best read to state the proper procedures for handling and filing defense motions for acquittals, but to leave unaddressed the court's authority to act on its own initiative.[12] Such a construction comports with the sound historical and commonsense reasons for concluding that Congress would not likely have intended to require a district court to enter a judgment of conviction against a defendant whom it knows to be innocent.[13]

III

A brief final word about the practical significance of today's holding. There is no real danger that district judges will be burdened by a flood of untimely motions. On the other hand, the possibility that an Act of God may preclude the timely filing of a meritorious motion cannot be denied. Because evidence of guilt is "absolutely vital to defendants," *Wiborg,* 163 U. S., at 658, that possibility, no matter how remote, is sufficient to justify a district court's inherent authority to avert the conviction of a legally innocent defendant despite the absence of a timely motion. Because there is no language in Rule 29 that purports to constrain the authority exercised in this case, I would reject the majority's interpretation of the Rule and adhere to the commonsense understanding revealed by the Court's holding in *Sisson.*

---

[12] For this reason, the Government's reliance on Rule 45 of the Federal Rules of Criminal Procedure is misplaced. Although Rule 45 generally permits a district court to hear an untimely motion if the defendant can demonstrate that excusable neglect caused the late filing, it specifically prohibits a district court from extending the time for "tak[ing] any action" under Rule 29. As I have explained, Rule 29(c) only addresses the rules that govern a defendant's postverdict acquittal motion; it does not address the district court's *sua sponte* postverdict acquittal power. Thus, while Rule 45 serves to make clear that district courts may not entertain defense motions for acquittal filed more than seven days after the jury's discharge, it speaks not at all to the court's inherent power to decline to enter a judgment of conviction *sua sponte* when the jury's verdict is not supported by legally sufficient evidence.

[13] The majority contends that if we accept that district courts have the discretion to refuse to consider untimely motions for acquittal, then we must also accept that district courts have the discretion to convict defendants whom they know to be innocent. *Ante,* at 431. The imaginative suggestion that some district judges might choose to convict those they believe to be innocent surely does not justify the conclusion that other judges should be required to do so.

Accordingly, I respectfully dissent.

UNITED STATES *v.* ARMSTRONG ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95–157. Argued February 26, 1996—Decided May 13, 1996

In response to their indictment on "crack" cocaine and other federal charges, respondents filed a motion for discovery or for dismissal, alleging that they were selected for prosecution because they are black. The District Court granted the motion over the Government's argument, among others, that there was no evidence or allegation that it had failed to prosecute nonblack defendants. When the Government indicated it would not comply with the discovery order, the court dismissed the case. The en banc Ninth Circuit affirmed, holding that the proof requirements for a selective-prosecution claim do not compel a defendant to demonstrate that the Government has failed to prosecute others who are similarly situated.

Held: For a defendant to be entitled to discovery on a claim that he was singled out for prosecution on the basis of his race, he must make a threshold showing that the Government declined to prosecute similarly situated suspects of other races. Pp. 461–471.

(a) Contrary to respondents' contention, Federal Rule of Criminal Procedure 16, which governs discovery in criminal cases, does not support the result reached by the Ninth Circuit in this case. Rule 16(a)(1)(C)—which, *inter alia*, requires the Government to permit discovery of documents that are "material to the preparation of the . . . defense" or "intended for use by the government as evidence in chief"—applies only to the preparation of the "defense" against the Government's case in chief, not to the preparation of selective-prosecution claims. This reading creates a perceptible symmetry between the types of documents referred to in the Rule. Moreover, its correctness is established beyond peradventure by Rule 16(a)(2), which, as relevant here, exempts from discovery the work product of Government attorneys and agents made in connection with the case's investigation. Respondents' construction of "defense" as including selective-prosecution claims is implausible: It creates the anomaly of a defendant's being able to examine all Government work product under Rule 16(a)(1)(C), except that which is most pertinent, the work product in connection with his own case, under Rule 16(a)(2). Pp. 461–463.

(b) Under the equal protection component of the Fifth Amendment's Due Process Clause, the decision whether to prosecute may not be based on an arbitrary classification such as race or religion. *Oyler* v. *Boles*, 368 U. S. 448, 456. In order to prove a selective-prosecution claim, the claimant must demonstrate that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose. *Ibid.* To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. *Ah Sin* v. *Wittman*, 198 U. S. 500. *Batson* v. *Kentucky*, 476 U. S. 79, and *Hunter* v. *Underwood*, 471 U. S. 222, distinguished. Although *Ah Sin* involved federal review of a state conviction, a similar rule applies where the power of a federal court is invoked to challenge an exercise of one of the core powers of the Executive Branch of the Federal Government, the power to prosecute. Discovery imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. Assuming that discovery is available on an appropriate showing in aid of a selective-prosecution claim, see *Wade* v. *United States*, 504 U. S. 181, the justifications for a rigorous standard of proof for the elements of such a case thus require a correspondingly rigorous standard for discovery in aid of it. Thus, in order to establish entitlement to such discovery, a defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not. In this case, respondents have not met this required threshold. Pp. 463–471.

48 F. 3d 1508, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined, and in which BREYER, J., joined in part. SOUTER, J., *post*, p. 471, and GINSBURG, J., *post*, p. 471, filed concurring opinions. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 471. STEVENS, J., filed a dissenting opinion, *post*, p. 476.

Solicitor General Days argued the cause for the United States. With him on the briefs were *Acting Assistant Attorney General Keeney, Deputy Solicitor General Dreeben, Irving L. Gornstein,* and *Kathleen A. Felton.*

Barbara E. O'Connor, by appointment of the Court, 516 U. S. 1007, argued the cause for respondents. With her on the brief for respondents Martin et al. were *Maria E. Stratton, Timothy C. Lannen,* by appointment of the Court, 516 U. S. 1007, *David Dudley, Bernard J. Rosen,* and

Eric Schnapper. Joseph F. Walsh, by appointment of the Court, 516 U. S. 1007, filed a brief for respondent Rozelle.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case, we consider the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race. We conclude that respondents failed to satisfy the threshold showing: They failed to show that the Government declined to prosecute similarly situated suspects of other races.

In April 1992, respondents were indicted in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack) and conspiring to distribute the same, in violation of 21 U. S. C. §§ 841 and 846 (1988 ed. and Supp. IV), and federal firearms offenses. For three months prior to the indictment, agents of the Federal Bureau of Alcohol, Tobacco, and Firearms and the Narcotics Division of the Inglewood, California, Police Department had infiltrated a suspected crack distribution ring by using three confidential informants. On seven separate occasions during this period, the informants had bought a total of 124.3 grams of crack from respondents and witnessed respondents carrying firearms during the sales. The agents searched the hotel room in which the sales were transacted, arrested respondents Armstrong and Hampton in the room, and found

---

*Briefs of *amici curiae* urging reversal were filed for the Criminal Justice Legal Foundation by *Kent F. Scheidegger;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for former law enforcement officials and police organizations et al. by *David Cole;* for the National Association of Criminal Defense Lawyers by *Judy Clarke* and *Nancy Hollander;* and for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Elaine R. Jones, Theodore M. Shaw, George H. Kendall,* and *Steven R. Shapiro.*

more crack and a loaded gun. The agents later arrested the other respondents as part of the ring.

In response to the indictment, respondents filed a motion for discovery or for dismissal of the indictment, alleging that they were selected for federal prosecution because they are black. In support of their motion, they offered only an affidavit by a "Paralegal Specialist," employed by the Office of the Federal Public Defender representing one of the respondents. The only allegation in the affidavit was that, in every one of the 24 §841 or §846 cases closed by the office during 1991, the defendant was black. Accompanying the affidavit was a "study" listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case.[1]

The Government opposed the discovery motion, arguing, among other things, that there was no evidence or allegation "that the Government has acted unfairly or has prosecuted non-black defendants or failed to prosecute them." App. 150. The District Court granted the motion. It ordered the Government (1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in those cases, (3) to identify what levels of law enforcement were involved in the investigations of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses. *Id.*, at 161–162.

The Government moved for reconsideration of the District Court's discovery order. With this motion it submitted affidavits and other evidence to explain why it had chosen to prosecute respondents and why respondents' study did not support the inference that the Government was singling out blacks for cocaine prosecution. The federal and local agents participating in the case alleged in affidavits that race played no role in their investigation. An Assistant United States Attorney explained in an affidavit that the decision to prosecute met the general criteria for prosecution, because

---

[1] Other defendants had introduced this study in support of similar discovery motions in at least two other Central District cocaine prosecutions. App. 83. Both motions were denied. One District Judge explained from the bench that the 23-person sample before him was "statistically insignificant," and that the evidence did not indicate "whether there is a bias in the distribution of crime that says black people use crack cocaine, hispanic people use powdered cocaine, caucasian people use whatever it is they use." *Id.*, at 119, 120.

> "there was over 100 grams of cocaine base involved, over twice the threshold necessary for a ten year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a fairly substantial crack cocaine ring; . . . there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence in the case was extremely strong, including audio and videotapes of defendants; . . . and several of the defendants had criminal histories including narcotics and firearms violations." *Id.*, at 81.

The Government also submitted sections of a published 1989 Drug Enforcement Administration report which concluded that "[l]arge-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack." J. Featherly & E. Hill, Crack Cocaine Overview 1989; App. 103.

In response, one of respondents' attorneys submitted an affidavit alleging that an intake coordinator at a drug treatment center had told her that there are "an equal number of caucasian users and dealers to minority users and dealers." *Id.*, at 138. Respondents also submitted an affidavit from a criminal defense attorney alleging that in his experience many nonblacks are prosecuted in state court for crack offenses, *id.*, at 141, and a newspaper article reporting that federal "crack criminals . . . are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is black," Newton, Harsher Crack Sentences Criticized as Racial Inequity, Los Angeles Times, Nov. 23, 1992, p. 1; App. 208–210.

The District Court denied the motion for reconsideration. When the Government indicated it would not comply with the court's discovery order, the court dismissed the case.[2]

A divided three-judge panel of the Court of Appeals for the Ninth Circuit reversed, holding that, because of the proof requirements for a selective-prosecution claim, defendants must "provide a colorable basis for believing that 'others similarly situated have not been prosecuted'" to obtain discovery. 21 F. 3d 1431, 1436 (1994) (quoting *United States* v. *Wayte*, 710 F. 2d 1385, 1387 (CA9 1983), aff'd, 470 U. S. 598 (1985)). The Court of Appeals voted to rehear the case en banc, and the en banc panel affirmed the District Court's order of dismissal, holding that "a defendant is not required to demonstrate that the government has failed to prosecute others who are similarly situated." 48 F. 3d 1508, 1516 (1995) (emphasis deleted). We granted certiorari to determine the appropriate standard for discovery for a selective-prosecution claim. 516 U. S. 942 (1995).

Neither the District Court nor the Court of Appeals mentioned Federal Rule of Criminal Procedure 16, which by its terms governs discovery in criminal cases. Both parties now discuss the Rule in their briefs, and respondents contend that it supports the result reached by the Court of Appeals. Rule 16 provides, in pertinent part:

> "Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects,

---

[2] We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race. Here, "it was the government itself that suggested dismissal of the indictments to the district court so that an appeal might lie." 48 F. 3d 1508, 1510 (CA9 1995).

> buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant." Fed. Rule Crim. Proc. 16(a)(1)(C).

Respondents argue that documents "within the possession . . . of the government" that discuss the Government's prosecution strategy for cocaine cases are "material" to respondents' selective-prosecution claim. Respondents argue that the Rule applies because any claim that "results in nonconviction" if successful is a "defense" for the Rule's purposes, and a successful selective-prosecution claim has that effect. Tr. of Oral Arg. 30.

We reject this argument, because we conclude that in the context of Rule 16 "the defendant's defense" means the defendant's response to the Government's case in chief. While it might be argued that as a general matter, the concept of a "defense" includes any claim that is a "sword," challenging the prosecution's conduct of the case, the term may encompass only the narrower class of "shield" claims, which refute the Government's arguments that the defendant committed the crime charged. Rule 16(a)(1)(C) tends to support the "shield-only" reading. If "defense" means an argument in response to the prosecution's case in chief, there is a perceptible symmetry between documents "material to the preparation of the defendant's defense," and, in the very next phrase, documents "intended for use by the government as evidence in chief at the trial."

If this symmetry were not persuasive enough, subdivision (a)(2) of Rule 16 establishes beyond peradventure that "defense" in subdivision (a)(1)(C) can refer only to defenses in response to the Government's case in chief. Rule 16(a)(2), as relevant here, exempts from defense inspection "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case."

Under Rule 16(a)(1)(C), a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product in connection with his case. If a selective-prosecution claim is a "defense," Rule 16(a)(1)(C) gives the defendant the right to examine Government work product in every prosecution except his own. Because respondents' construction of "defense" creates the anomaly of a defendant's being able to examine all Government work product except the most pertinent, we find their construction implausible. We hold that Rule 16(a)(1)(C) authorizes defendants to examine Government documents material to the preparation of their defense against the Government's case in chief, but not to the preparation of selective-prosecution claims.

In *Wade* v. *United States*, 504 U. S. 181 (1992), we considered whether a federal court may review a Government decision not to file a motion to reduce a defendant's sentence for substantial assistance to the prosecution, to determine whether the Government based its decision on the defendant's race or religion. In holding that such a decision was reviewable, we assumed that discovery would be available if the defendant could make the appropriate threshold showing, although we concluded that the defendant in that case did not make such a showing. See *id.*, at 186. We proceed on a like assumption here.

A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a "background presumption," cf. *United States* v. *Mezzanatto*, 513 U. S. 196, 203

(1995), that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.

A selective-prosecution claim asks a court to exercise judicial power over a "special province" of the Executive. *Heckler* v. *Chaney,* 470 U. S. 821, 832 (1985). The Attorney General and United States Attorneys retain " 'broad discretion' " to enforce the Nation's criminal laws. *Wayte* v. *United States,* 470 U. S. 598, 607 (1985) (quoting *United States* v. *Goodwin,* 457 U. S. 368, 380, n. 11 (1982)). They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." U. S. Const., Art. II, § 3; see 28 U. S. C. §§ 516, 547. As a result, "[t]he presumption of regularity supports" their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.,* 272 U. S. 1, 14–15 (1926). In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes,* 434 U. S. 357, 364 (1978).

Of course, a prosecutor's discretion is "subject to constitutional constraints." *United States* v. *Batchelder,* 442 U. S. 114, 125 (1979). One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, *Bolling* v. *Sharpe,* 347 U. S. 497, 500 (1954), is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler* v. *Boles,* 368 U. S. 448, 456 (1962). A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 373 (1886).

In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary." *Chemical Foundation, supra,* at 14–15. We explained in *Wayte* why courts are "properly hesitant to examine the decision whether to prosecute." 470 U. S., at 608. Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Id.,* at 607. It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Ibid.*

The requirements for a selective-prosecution claim draw on "ordinary equal protection standards." *Id.,* at 608. The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Ibid.;* accord, *Oyler, supra,* at 456. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. This requirement has been established in our case law since *Ah Sin* v. *Wittman,* 198 U. S. 500 (1905). Ah Sin, a subject of China, petitioned a California state court for a writ of habeas corpus, seeking discharge from imprisonment under a San Francisco County ordinance prohibiting persons from setting up gambling tables in rooms barricaded to stop police from entering. *Id.*, at 503. He alleged in his habeas petition "that the ordinance is enforced 'solely and exclusively against persons of the Chinese race and not otherwise.'" *Id.*, at 507. We rejected his contention that this averment made out a claim under the Equal Protection Clause, because it did not allege "that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced." *Id.*, at 507–508.

The similarly situated requirement does not make a selective-prosecution claim impossible to prove. Twenty years before *Ah Sin*, we invalidated an ordinance, also adopted by San Francisco, that prohibited the operation of laundries in wooden buildings. *Yick Wo*, 118 U. S., at 374. The plaintiff in error successfully demonstrated that the ordinance was applied against Chinese nationals but not against other laundry-shop operators. The authorities had denied the applications of 200 Chinese subjects for permits to operate shops in wooden buildings, but granted the applications of 80 individuals who were not Chinese subjects to operate laundries in wooden buildings "under similar conditions." *Ibid.* We explained in *Ah Sin* why the similarly situated requirement is necessary:

> "No latitude of intention should be indulged in a case like this. There should be certainty to every intent. Plaintiff in error seeks to set aside a criminal law of the State, not on the ground that it is unconstitutional on its face, not that it is discriminatory in tendency and ultimate actual operation as the ordinance was which was passed on in the *Yick Wo case*, but that it was made so by the manner of its administration. This is a matter of proof, and *no fact should be omitted to make it out completely*, when the power of a Federal court is in-

> voked to interfere with the course of criminal justice of a State." 198 U. S., at 508 (emphasis added).

Although *Ah Sin* involved federal review of a state conviction, we think a similar rule applies where the power of a federal court is invoked to challenge an exercise of one of the core powers of the Executive Branch of the Federal Government, the power to prosecute.

Respondents urge that cases such as *Batson* v. *Kentucky*, 476 U. S. 79 (1986), and *Hunter* v. *Underwood*, 471 U. S. 222 (1985), cut against any absolute requirement that there be a showing of failure to prosecute similarly situated individuals. We disagree. In *Hunter*, we invalidated a state law disenfranchising persons convicted of crimes involving moral turpitude. *Id.*, at 233. Our holding was consistent with ordinary equal protection principles, including the similarly situated requirement. There was convincing direct evidence that the State had enacted the provision for the purpose of disenfranchising blacks, *id.*, at 229–231, and indisputable evidence that the state law had a discriminatory effect on blacks as compared to similarly situated whites: Blacks were " 'by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under' " the law in question, *id.*, at 227 (quoting *Underwood* v. *Hunter*, 730 F. 2d 614, 620 (CA11 1984)). *Hunter* thus affords no support for respondents' position.

In *Batson*, we considered "[t]he standards for assessing a prima facie case in the context of discriminatory selection of the venire" in a criminal trial. 476 U. S., at 96. We required a criminal defendant to show "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race" and that this fact, the potential for abuse inherent in a peremptory strike, and "any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Ibid.* During jury selection, the entire *res gestae* take place in front of the trial judge. Because the judge has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a "pattern" of singling out members of a single race for peremptory challenges. See *id.*, at 97. He is in a position to discern whether a challenge to a black juror has evidentiary significance; the significance may differ if the venire consists mostly of blacks or of whites. Similarly, if the defendant makes out a prima facie case, the prosecutor is called upon to justify only decisions made in the very case then before the court. See *id.*, at 97–98. The trial judge need not review prosecutorial conduct in relation to other venires in other cases.

Having reviewed the requirements to prove a selective-prosecution claim, we turn to the showing necessary to obtain discovery in support of such a claim. If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

The parties, and the Courts of Appeals which have considered the requisite showing to establish entitlement to discovery, describe this showing with a variety of phrases, like "colorable basis," "substantial threshold showing," Tr. of Oral Arg. 5, "substantial and concrete basis," or "reasonable likelihood," Brief for Respondents Martin et al. 30. However, the many labels for this showing conceal the degree of consensus about the evidence necessary to meet it. The Courts of Appeals "require some evidence tending to show the existence of the essential elements of the defense," discriminatory effect and discriminatory intent. *United States* v. *Berrios*, 501 F. 2d 1207, 1211 (CA2 1974).

In this case we consider what evidence constitutes "some evidence tending to show the existence" of the discriminatory effect element. The Court of Appeals held that a defendant may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant. 48 F. 3d, at 1516. We think it was mistaken in this view. The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law. *United States* v. *Parham,* 16 F. 3d 844, 846–847 (CA8 1994); *United States* v. *Fares,* 978 F. 2d 52, 59–60 (CA2 1992); *United States* v. *Peete,* 919 F. 2d 1168, 1176 (CA6 1990); *C. E. Carlson, Inc.* v. *SEC,* 859 F. 2d 1429, 1437–1438 (CA10 1988); *United States* v. *Greenwood,* 796 F. 2d 49, 52–53 (CA4 1986); *United States* v. *Mitchell,* 778 F. 2d 1271, 1277 (CA7 1985). As the three-judge panel explained, " '[s]elective prosecution' implies that a selection has taken place." 21 F. 3d, at 1436.[3]

The Court of Appeals reached its decision in part because it started "with the presumption that people of *all* races commit *all* types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group." 48 F. 3d, at 1516–1517. It cited no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black, United States Sentencing Comm'n, 1994 Annual Report 107 (Table 45); 93.4% of convicted LSD dealers were white, *ibid.;* and 91% of those convicted for pornography or prostitution were white, *id.,* at 41 (Table 13). Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue.

---

[3] We reserve the question whether a defendant must satisfy the similarly situated requirement in a case "involving direct admissions by [prosecutors] of discriminatory purpose." Brief for United States 15.

The Court of Appeals also expressed concern about the "evidentiary obstacles defendants face." 48 F. 3d, at 1514. But all of its sister Circuits that have confronted the issue have required that defendants produce some evidence of differential treatment of similarly situated members of other races or protected classes. In the present case, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents. For instance, respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court. We think the required threshold—a credible showing of different treatment of similarly situated persons—adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution.

In the case before us, respondents' "study" did not constitute "some evidence tending to show the existence of the essential elements of" a selective-prosecution claim. *Berrios, supra,* at 1211. The study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. This omission was not remedied by respondents' evidence in opposition to the Government's motion for reconsideration. The newspaper article, which discussed the discriminatory effect of federal drug sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute. Respondents' affidavits, which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, concurring.

I join the Court's opinion, but in its discussion of Federal Rule of Criminal Procedure 16 only to the extent of its application to the issue in this case.

JUSTICE GINSBURG, concurring.

I do not understand the Court to have created a "major limitation" on the scope of discovery available under Federal Rule of Criminal Procedure 16. See *post,* at 475 (BREYER, J., concurring in part and concurring in judgment). As I see it, the Court has decided a precise issue: whether the phrase "defendant's defense," as used in Rule 16(a)(1)(C), encompasses allegations of selective prosecution. I agree with the Court, for reasons the opinion states, that subdivision (a)(1)(C) does not apply to selective prosecution claims. The Court was not called upon to decide here whether Rule 16(a)(1)(C) applies in any other context, for example, to affirmative defenses unrelated to the merits. With the caveat that I do not read today's opinion as precedent foreclosing issues not tendered for review, I join the Court's opinion.

JUSTICE BREYER, concurring in part and concurring in the judgment.

I write separately because, in my view, Federal Rule of Criminal Procedure 16 does not limit a defendant's discovery rights to documents related to the Government's case in chief. *Ante,* at 462–463. The Rule says that "the government shall permit the defendant to inspect and copy" certain physical items (I shall summarily call them "documents") "which are material to the preparation of the defendant's defense." Fed. Rule Crim. Proc. 16(a)(1)(C). A "defendant's defense" can take many forms, including (1) a simple response to the Government's case in chief, (2) an affirmative defense unrelated to the merits (such as a Speedy Trial Act claim), (3) an unrelated claim of constitutional right, (4) a foreseeable surrebuttal to a likely Government rebuttal, and others. The Rule's language does not limit its scope to the first item on this list. To interpret the Rule in this limited way creates a legal distinction that, from a discovery perspective, is arbitrary. It threatens to create two full parallel sets of criminal discovery principles. And, as far as I can tell, the interpretation lacks legal support.

The Court bases its interpretation upon what it says is a "perceptible symmetry," *ante*, at 462, between two phrases in Rule 16(a)(1)(C)—the phrase "material to the preparation of the defendant's defense," and the next phrase, "intended for use by the government as evidence in chief at the trial." To test the Court's argument, consider these two phrases in context. The Rule says:

> "Upon request of the defendant the government shall permit the defendant to inspect and copy [documents and other items] . . . which [1] are material to the preparation of the defendant's defense or [2] are intended for use by the government as evidence in chief at the trial, or [3] were obtained from or belong to the defendant." Fed. Rule Crim. Proc. 16(a)(1)(C).

Though symmetry may reside in the eye of the beholder, I can find no relevant symmetry here. Rather, the language suggests a simple three-part categorization of the documents and other physical items that the Rule requires the Government to make available to the defendant. From a purely linguistic perspective, there is no more reason to import into the first category a case-in-chief-related limitation (from the second category) than some kind of defendant's-belongings-related limitation (from the third category).

Rule 16 creates these three categories for a reason that belies "symmetry"—namely, to specify two sets of items (the

Government's case in chief evidence, the defendant's belongings) that the Government must make available to the defendant without a preliminary showing of "materiality." The Rule's first category creates a residual classification (items "material to the preparation of the defendant's defense") that require a preliminary "materiality" showing. The Committee thought, however, that "[l]imiting the rule to situations in which the defendant can show that the evidence is material seems unwise. . . . For this reason subdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant." Advisory Committee's Notes on Fed. Rule Crim. Proc. 16, 18 U. S. C. App., p. 762 (second and third categories added to specify that, *without a special showing of materiality*, certain items are almost always "material") (citing 1 C. Wright, Federal Practice and Procedure § 254, p. 510, n. 58, p. 513, n. 70 (1969)). Nothing in the Notes, or in the Rule's language, suggests that the residual category of items "material to the preparation of the defendant's defense," means to cover only those items related to the case in chief.

The only other reason the majority advances in support of its "case in chief" limitation concerns a later part of the Rule, subdivision 16(a)(2). As relevant here, that subdivision exempts Government attorney work product from certain of Rule 16's disclosure requirements. In the majority's view, since (1) a defendant asserting a valid "selective prosecution" defense would likely need prosecution work product to make his case, but (2) the Rule exempts prosecution work product from discovery, then (3) the Rule must have some kind of implicit limitation (such as a "case in chief" limitation) that makes it irrelevant to defense efforts to assert "selective prosecution" defenses.

The majority's conclusion, however, does not follow from its premises. For one thing, Rule 16's work-product exception may itself contain implicit exceptions. After all, "[t]he privilege derived from the work-product doctrine is not absolute." *United States* v. *Nobles,* 422 U. S. 225, 239 (1975); see also 8 C. Wright, A. Miller, & R. Marcus, Federal Practice and Procedure § 2022, p. 324 (2d ed. 1994) (in civil context, work product "is discoverable only on a substantial showing of 'necessity or justification' ") (quoting *Hickman* v. *Taylor,* 329 U. S. 495, 510 (1947)); J. Ghent, Development, Since Hickman v. Taylor, of Attorney's "Work Product" Doctrine, 35 A. L. R. 3d 412, 465–469, § 25 (1971) (in civil context, work-product protection is not absolute, but is a "qualified privilege or immunity"). To the extent such a reading permits a defendant to obtain "work product" in an appropriate case (say, with a strong prima facie showing of selective prosecution), the Court's problem does not exist. Of course, to read the work-product exception as containing some such implicit exception itself represents a departure from the Rule's literal language. But, is it not far easier to believe the Rule's authors intended some such small implicit exception to an exception, consistent with the language and purpose of the Rule, than that they intended the very large exception created by the Court?

For another thing, even if one reads the work-product exception literally, the Court's problem disappears as long as courts can *supplement* Rule 16 discovery with discovery based upon *other* legal principles. The language of the work-product exception suggests the possibility of such supplementation, for it says, not that work product is "exemp[t]" from discovery, *ante,* at 462, but that "*this rule*" does not authorize discovery of the prosecutor's work product. Fed. Rule Civ. Proc. 16(a)(2). The Advisory Committee's Notes make clear that the Committee believed that *other* rules of law may authorize (or require) discovery not mentioned in the Rule. See, *e. g.*, Advisory Committee's Notes on Rule 16, 18 U. S. C. App., pp. 762, 763 (discussion of *Brady* v. *Maryland,* 373 U. S. 83 (1963), which the Rule does not codify); 18 U. S. C. App., p. 761 ("[Rule 16] is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases"); see also 2 C. Wright, Federal Practice and Procedure § 254, p. 81, and n. 60 (2d ed. 1982) ("Because Brady is based on the Constitution, it overrides court-made rules of procedure. Thus the work-product immunity for discovery in Rule 16(a)(2) prohibits discovery under Rule 16 but it does not alter the prosecutor's duty to disclose material that is within Brady") (footnotes omitted). Of course, the majority, in a sense, reads the Rule as permitting supplementation, but it does more. It goes well beyond the *added* (say, constitutionally related) rule supplementation needed to overcome its problem; instead, it *shrinks* the Rule by unnecessarily creating a major limitation on its scope.

Finally, and in any event, here the defendants sought discovery of information that is not work product. See *ante*, at 459. Thus, we need not decide whether in an appropriate case it would be necessary to find an implicit exception to the language of Rule 16(a)(2), or to find an independent constitutional source for the discovery, or to look for some other basis.

In sum, neither the alleged "symmetry" in the structure of Rule 16(a)(1)(C), nor the work-product exception of Rule 16(a)(2), supports the majority's limitation of discovery under Rule 16(a)(1)(C) to documents related to the Government's "case in chief." Rather, the language and legislative history make clear that the Rule's drafters meant it to provide a broad authorization for defendants' discovery, to be supplemented if necessary in an appropriate case. Whether or not one can *also* find a basis for this kind of discovery in other sources of law, Rule 16(a)(1)(C) provides *one* such source, and we should consider whether the defendants' discovery request satisfied the Rule's requirement that the discovery be "material to the preparation of the defendant's defense."

I believe that the defendants' request did not satisfy this threshold. Were the "selective prosecution" defense valid in this case—*i. e.*, were there "clear evidence," *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14 (1926), that the Federal Government's prosecutorial policy "had a discriminatory effect and . . . was motivated by a discriminatory purpose," *Wayte* v. *United States*, 470 U. S. 598, 608 (1985), it should have been fairly easy for the defendants to find, not only instances in which the Federal Government prosecuted African-Americans, but also some instances in which the Federal Government did not prosecute similarly situated caucasians. The defendants' failure to do so, for the reasons the Court sets forth, amounts to a failure to make the necessary threshold showing in respect to materiality. See 2 C. Wright, Federal Practice and Procedure § 254, pp. 66–67 (2d ed. 1982); *United States* v. *Balk*, 706 F. 2d 1056, 1060 (CA9 1983); *United States* v. *Johnson*, 577 F. 2d 1304, 1309 (CA5 1978); *United States* v. *Murdock*, 548 F. 2d 599, 600 (CA5 1977).

JUSTICE STEVENS, dissenting.

Federal prosecutors are respected members of a respected profession. Despite an occasional misstep, the excellence of their work abundantly justifies the presumption that "they have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14–15 (1926). Nevertheless, the possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored. *Oyler* v. *Boles*, 368 U. S. 448, 456 (1962). For that reason, it has long been settled that the prosecutor's broad discretion to determine when criminal charges should be filed is not completely unbridled. As the Court notes, however, the scope of judicial review of particular exercises of that discretion is not fully defined. See *ante*, at 469, n. 3.

The United States Attorney for the Central District of California is a member and an officer of the bar of that District Court. As such, she has a duty to the judges of that Court to maintain the standards of the profession in the performance of her official functions. If a District Judge has reason to suspect that she, or a member of her staff, has singled out particular defendants for prosecution on the basis of their race, it is surely appropriate for the judge to determine whether there is a factual basis for such a concern. I agree with the Court that Rule 16 of the Federal Rules of Criminal Procedure is not the source of the District Court's power to make the necessary inquiry. I disagree, however, with its implicit assumption that a different, relatively rigid rule needs to be crafted to regulate the use of this seldom-exercised inherent judicial power. See Advisory Committee's Notes on Rule 16, 18 U. S. C. App., p. 761 (Rule 16 is "not intended to limit the judge's discretion to order broader discovery in appropriate cases").

The Court correctly concludes that in this case the facts presented to the District Court in support of respondents' claim that they had been singled out for prosecution because of their race were not sufficient to prove that defense. Moreover, I agree with the Court that their showing was not strong enough to give them a *right* to discovery, either under Rule 16 or under the District Court's inherent power to order discovery in appropriate circumstances. Like Chief Judge Wallace of the Court of Appeals, however, I am persuaded that the District Judge did not abuse her discretion when she concluded that the factual showing was sufficiently disturbing to require some response from the United States Attorney's Office. See 48 F. 3d 1508, 1520–1521 (CA9 1995). Perhaps the discovery order was broader than necessary, but I cannot agree with the Court's apparent conclusion that no inquiry was permissible.

The District Judge's order should be evaluated in light of three circumstances that underscore the need for judicial vigilance over certain types of drug prosecutions. First, the Anti-Drug Abuse Act of 1986 and subsequent legislation established a regime of extremely high penalties for the possession and distribution of so-called "crack" cocaine.[1] Those provisions treat one gram of crack as the equivalent of 100 grams of powder cocaine. The distribution of 50 grams of crack is thus punishable by the same mandatory minimum sentence of 10 years in prison that applies to the distribution of 5,000 grams of powder cocaine.[2] The Sentencing Guidelines extend this ratio to penalty levels above the mandatory minimums: For any given quantity of crack, the guideline range is the same as if the offense had involved 100 times that amount in powder cocaine.[3] These penalties result in sentences for crack offenders that average three to eight times longer than sentences for comparable powder offenders.[4] United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 145 (Feb. 1995) (hereinafter Special Report).

---

[1] 100 Stat. 3207, 21 U. S. C. § 841 *et seq.*

[2] Compare 21 U. S. C. § 841(b)(1)(A)(iii) with § 841(b)(1)(A)(ii). Similarly, a mandatory 5-year sentence is prescribed for distribution of 500 grams of cocaine or 5 grams of crack. Compare § 841(b)(1)(B)(ii) with § 841(b)(1)(B)(iii). Simple possession of 5 grams of crack also produces a mandatory 5-year sentence. The maximum sentence for possession of *any* quantity of other drugs is one year. § 844(a).

With one prior felony drug offense, the sentence for distribution of 50 grams of crack is a mandatory 20 years to life. § 841(b)(1)(A). With two prior felony drug offenses, the sentence is a mandatory life term without parole. *Ibid.*

[3] See United States Sentencing Commission, Guidelines Manual § 2D1.1(c) (Nov. 1995) (USSG).

[4] Under the Guidelines, penalties increase at a slower rate than drug quantities. For example, 5 grams of heroin result in a base offense level of 14 (15–21 months) while 10 grams of heroin (double the amount) result in an offense level of 16 (21–27 months). USSG §§ 2D1.1(c)(13), (12). Thus, the 100-to-1 ratio does not translate into sentences that are 100 times as long.

Second, the disparity between the treatment of crack cocaine and powder cocaine is matched by the disparity between the severity of the punishment imposed by federal law and that imposed by state law for the same conduct. For a variety of reasons, often including the absence of mandatory minimums, the existence of parole, and lower baseline penalties, terms of imprisonment for drug offenses tend to be substantially lower in state systems than in the federal system. The difference is especially marked in the case of crack offenses. The majority of States draw no distinction between types of cocaine in their penalty schemes; of those that do, none has established as stark a differential as the Federal Government. See *id.*, at x, 129–138. For example, if respondent Hampton is found guilty, his federal sentence might be as long as a mandatory life term. Had he been tried in state court, his sentence could have been as short as 12 years, less worktime credits of half that amount.[5]

Finally, it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks. While 65% of the persons who have used crack are white, in 1993 they represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black. *Id.*, at 39, 161. During the first 18 months of full guideline implementation, the sentencing disparity between black and white defendants grew from preguideline levels: Blacks on average received sentences over 40% longer than whites. See Bureau of Justice Statistics, Sentencing in the Federal Courts: Does Race Matter? 6–7 (Dec. 1993). Those figures represent a major threat to the integrity of federal sentencing reform, whose main purpose was the elimination of disparity (especially racial) in sentencing. The Sentencing Commission acknowledges that the heightened crack penalties are a "primary cause of the growing disparity between sentences for Black and White federal defendants." Special Report 163.

---

[5] Hampton was charged with conspiracy to distribute, four counts of crack distribution, and the use or carrying of a firearm in relation to a drug crime. According to an information filed by the Government, Hampton had three prior convictions for felony drug offenses. See Information Establishing Prior Felony Narcotics Convictions (June 24, 1992). Therefore, he potentially faces a mandatory life sentence on the drug charges alone.

Under California law at the time of the offenses, possession for sale of cocaine base involving 50 grams carried a penalty of imprisonment for either three, four, or five years. Cal. Health & Safety Code Ann. § 11351.5 (West 1988). If the defendant had no prior convictions, he could be granted probation. § 11370. For each prior felony drug conviction, the defendant received an additional 3-year sentence. § 11370.2. Thus, with three priors and the possibility of worktime reductions, see Cal. Penal Code Ann. § 2933 (West Supp. 1996), Hampton could have served as little as six years under California law. Since the time of the offenses, California has raised several of these penalties, but the new punishments could not be applied to respondents.

The extraordinary severity of the imposed penalties and the troubling racial patterns of enforcement give rise to a special concern about the fairness of charging practices for crack offenses. Evidence tending to prove that black defendants charged with distribution of crack in the Central District of California are prosecuted in federal court, whereas members of other races charged with similar offenses are prosecuted in state court, warrants close scrutiny by the federal judges in that district. In my view, the District Judge, who has sat on both the federal and the state benches in Los Angeles, acted well within her discretion to call for the development of facts that would demonstrate what standards, if any, governed the choice of forum where similarly situated offenders are prosecuted.

Respondents submitted a study showing that of all cases involving crack offenses that were closed by the Federal Public Defender's Office in 1991, 24 out of 24 involved black defendants. To supplement this evidence, they submitted affidavits from two of the attorneys in the defense team. The first reported a statement from an intake coordinator at a local drug treatment center that, in his experience, an equal number of crack users and dealers were caucasian as belonged to minorities. App. 138. The second was from David R. Reed, counsel for respondent Armstrong. Reed was both an active court-appointed attorney in the Central District of California and one of the directors of the leading association of criminal defense lawyers who practice before the Los Angeles County courts. Reed stated that he did not recall "ever handling a [crack] cocaine case involving non-black defendants" in federal court, nor had he even heard of one. *Id.*, at 140. He further stated that "[t]here are many crack cocaine sales cases prosecuted in state court that *do* involve racial groups other than blacks." *Id.*, at 141 (emphasis in original).

The majority discounts the probative value of the affidavits, claiming that they recounted "hearsay" and reported "personal conclusions based on anecdotal evidence." *Ante*, at 470. But the Reed affidavit plainly contained more than mere hearsay; Reed offered information based on his own extensive experience in both federal and state courts. Given the breadth of his background, he was well qualified to compare the practices of federal and state prosecutors. In any event, the Government never objected to the admission of either affidavit on hearsay or any other grounds. See 48 F. 3d, at 1518, n. 8. It was certainly within the District Court's discretion to credit the affidavits of two members of the bar of that Court, at least one of whom had presumably acquired a reputation by his frequent appearances there, and both of whose statements were made on pains of perjury.

The criticism that the affidavits were based on "anecdotal evidence" is also unpersuasive. I thought it was agreed that defendants do not need to prepare sophisticated statistical studies in order to receive mere discovery in cases like this one. Certainly evidence based on a drug counselor's personal observations or on an attorney's practice in two sets of courts, state and federal, can "'ten[d] to show the existence'" of a selective prosecution. *Ante*, at 468.

Even if respondents failed to carry their burden of showing that there were individuals who were not black but who could have been prosecuted in federal court for the same offenses, it does not follow that the District Court abused its discretion in ordering discovery. There can be no doubt that such individuals exist, and indeed the Government has never denied the same. In those circumstances, I fail to see why the District Court was unable to take judicial notice of this obvious fact and demand information from the Government's files to support or refute respondents' evidence. The presumption that some whites are prosecuted in state court is not "contradicted" by the statistics the majority cites, which show only that high percentages of blacks are *convicted* of certain federal crimes, while high percentages of whites are convicted of other federal crimes. See *ante*, at 469–470. Those figures are entirely consistent with the allegation of selective prosecution. The relevant comparison, rather, would be with the percentages of blacks and whites who *commit* those crimes. But, as discussed above, in the case of crack far greater numbers of whites are believed guilty of using the substance. The District Court, therefore, was entitled to find the evidence before it significant and to require some explanation from the Government.[6]

---

[6] Also telling was the Government's response to respondents' evidentiary showing. It submitted a list of more than 3,500 defendants who had been charged with federal narcotics violations over the previous three years. It also offered the names of 11 nonblack defendants whom it had prosecuted for crack offenses. All 11, however, were members of other racial or ethnic minorities. See 48 F. 3d 1508, 1511 (CA9 1995). The District Court was authorized to draw adverse inferences from the Government's inability to produce a single example of a white defendant, especially when the very purpose of its exercise was to allay the court's concerns about the evidence of racially selective prosecutions. As another court has said: "Statistics are not, of course, the whole answer, but nothing is as emphatic as zero . . . ." *United States* v. *Hinds County School Bd.*, 417 F. 2d 852, 858 (CA5 1969) *(per curiam).*

In sum, I agree with the Sentencing Commission that "[w]hile the exercise of discretion by prosecutors and investigators has an impact on sentences in almost all cases to some extent, because of the 100-to-1 quantity ratio and federal mandatory minimum penalties, discretionary decisions in cocaine cases often have dramatic effects." Special Report 138.[7] The severity of the penalty heightens both the danger of arbitrary enforcement and the need for careful scrutiny of any colorable claim of discriminatory enforcement. Cf. *McCleskey* v. *Kemp*, 481 U. S. 279, 366 (1987) (STEVENS, J., dissenting). In this case, the evidence was sufficiently disturbing to persuade the District Judge to order discovery that might help explain the conspicuous racial pattern of cases before her court. I cannot accept the majority's conclusion that the District Judge either exceeded her power or abused her discretion when she did so. I therefore respectfully dissent.

---

[7] For this and other reasons, the Sentencing Commission in its Special Report to Congress "strongly recommend[ed] against a 100-to-1 quantity ratio." Special Report 198. The Commission shortly thereafter, by a 4-to-3 vote, amended the Guidelines so as to equalize the treatment of crack and other forms of cocaine, and proposed modification of the statutory mandatory minimum penalties for crack offenses. See Statement of Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy (May 1, 1995). In October 1995, Congress overrode the Sentencing Commission's Guideline amendments. See Pub. L. 104–38, 109 Stat. 334. Nevertheless, Congress at the same time directed the Commission to submit recommendations regarding changes to the statutory and guideline penalties for cocaine distribution, including specifically "revision of the drug quantity ratio of crack cocaine to powder cocaine." § 2(a).

44 LIQUORMART, INC., ET AL. *v.* RHODE ISLAND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 94–1140. Argued November 1, 1995—Decided May 13, 1996

Petitioners, a licensed Rhode Island liquor retailer and a licensed Massachusetts liquor retailer patronized by Rhode Island residents, filed this action seeking a declaratory judgment that Rhode Island laws banning the advertisement of retail liquor prices except at the place of sale violate the First Amendment. In concluding that the ban was unconstitutional because it did not directly advance the State's asserted interest in the promotion of temperance and was more extensive than necessary to serve that interest, the District Court reasoned that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it and that the Twenty-first Amendment did not shift or diminish that burden. In reversing, the Court of Appeals, *inter alia,* found "inherent merit" in the State's submission that competitive price advertising would ultimately increase sales, and agreed with it that the Twenty-first Amendment gave its advertising ban an added presumption of validity.

Held: The judgment is reversed.

39 F. 3d 5, reversed.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, VII, and VIII, concluding:

1. The Twenty-first Amendment cannot save Rhode Island's price advertising ban because that Amendment does not qualify the First Amendment's prohibition against laws abridging the freedom of speech. Although the Twenty-first Amendment—which repealed Prohibition and gave the States the power to prohibit commerce in, or the use of, alcoholic beverages—limits the dormant Commerce Clause's effect on a State's regulatory power over the delivery or use of liquor within its borders, the Amendment does not license the States to ignore their obligations under other constitutional provisions. See, *e. g., Capital Cities Cable, Inc.* v. *Crisp,* 467 U. S. 691, 712. *California* v. *LaRue,* 409 U. S. 109, 118–119, disavowed. Because the First Amendment must be included among those other provisions, the Twenty-first Amendment does not shield the advertising ban from constitutional scrutiny. Pp. 514–516.

2. Because Rhode Island has failed to carry its heavy burden of justifying its complete ban on price advertising, that ban is invalid. P. 516.

JUSTICE STEVENS delivered the principal opinion with respect to Parts III–VI, concluding that Rhode Island's ban on advertisements that provide the public with accurate information about retail liquor prices is an unconstitutional abridgment of the freedom of speech. Pp. 495–514.

(a) JUSTICE STEVENS, joined by JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG, concluded in Part III that although the First Amendment protects the dissemination of truthful and nonmisleading commercial messages about lawful products and services in order to ensure that consumers receive accurate information, see, *e. g., Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 765, the special nature of commercial speech, including its "greater objectivity" and "greater hardiness," authorizes the State to regulate potentially deceptive or overreaching advertising more freely than other forms of protected speech, see, *e. g., id.*, at 771–772, n. 24, and requires less than strict review of such regulations, *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566, n. 9. However, regulations that entirely suppress commercial speech in order to pursue a policy not related to consumer protection must be reviewed with "special care," and such blanket bans should not be approved unless the speech itself was flawed in some way, either because it was deceptive or related to unlawful activity. See *ibid.* Pp. 495–500.

(b) JUSTICE STEVENS, joined by JUSTICE KENNEDY and JUSTICE GINSBURG, concluded in Part IV that a review of the case law reveals that commercial speech regulations are not all subject to a similar form of constitutional review simply because they target a similar category of expression. When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the regulation's purpose is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, where a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands. The special dangers that attend such complete bans—including, most obviously, the fact that they all but foreclose alternative channels of communication—present sound reasons that justify more careful review. Pp. 501–504.

(c) JUSTICE STEVENS, joined by JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG, concluded in Part V that because Rhode Island's advertising ban constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product, and serves an end unrelated to consumer protection, it must be reviewed with "special care" under *Central Hudson,* 447 U. S., at 566, n. 9. It cannot survive that review because it does not satisfy even the less than strict standard that generally applies in commercial speech cases under *Central Hudson, id.,* at 566. First, the advertising ban does not directly advance the State's substantial interest in promoting temperance. See *ibid.* Because a commercial speech regulation may not be sustained if it provides only ineffective or remote support for the government's purpose, *id.,* at 564, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so "to a material degree," see, *e. g., Edenfield* v. *Fane,* 507 U. S. 761, 767. In this case, therefore, the State must show that the ban will *significantly* reduce alcohol consumption, but has presented no evidence to suggest a significant reduction. Second, the ban is more extensive than necessary to serve its stated interest, see 447 U. S., at 566, since alternative forms of regulation that would not involve any speech restrictions—*e. g.,* the maintenance of higher prices either by direct regulation or by increased taxation, the rationing of per capita purchases, or the use of educational campaigns focused on drinking problems—would be more likely to achieve the goal of promoting temperance. Thus, the State has failed to establish the requisite "reasonable fit" between its regulation and its goal. See, *e. g., Board of Trustees, State Univ. of N. Y.* v. *Fox,* 492 U. S. 469, 480. Pp. 504–508.

(d) JUSTICE STEVENS, joined by JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE GINSBURG, concluded in Part VI that the State's arguments in support of its claim that it merely exercised appropriate "legislative judgment" in determining that a price advertising ban would best promote temperance—*i. e.,* (1) that because expert opinions as to the effectiveness of the ban "go both ways," the Court of Appeals correctly concluded that the ban constituted a "reasonable choice" by the legislature; (2) that precedent requires that particular deference be accorded that legislative choice because the State could, if it chose, ban the sale of alcoholic beverages outright; and (3) that deference is appropriate because alcoholic beverages are so-called "vice" products—must be rejected. See *Rubin,* 514 U. S., at 482–483, n. 2. *United States* v. *Edge Broadcasting,* 509 U. S. 418, distinguished; *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.,* 478 U. S. 328, distinguished and disavowed in part. Pp. 508–514.

JUSTICE SCALIA concluded that guidance as to what the First Amendment forbids, where the core offense of suppressing particular political ideas is not at issue, must be taken from the long accepted practices of the American people. See *McIntyre* v. *Ohio Elections Comm'n,* 514 U. S. 334, 375 (SCALIA, J., dissenting). Since, however, the Court has before it no evidence as to state legislative practices regarding regulation of commercial speech when the First and Fourteenth Amendments were adopted, or even as to any national consensus on the subject later developed, he would simply adhere to the Court's existing jurisprudence, which renders the Rhode Island regulation invalid. Pp. 517–518.

JUSTICE THOMAS concluded that in cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the *Central Hudson* balancing test should not be applied. Rather, such an "interest" is *per se* illegitimate, cf., *e. g., Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 768–770, and can no more justify regulation of "commercial" speech than it can justify regulation of "noncommercial" speech. Pp. 518–528.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE SOUTER, and JUSTICE BREYER, agreed with the principal opinion that Rhode Island's prohibition on alcohol-price advertising is invalid and cannot be saved by the Twenty-first Amendment, but concluded that the First Amendment question must be resolved more narrowly by applying the test established in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566. Assuming that the prohibition satisfies the test's first three prongs—*i. e.*, that (1) the speech at issue concerns lawful activity and is not misleading, (2) the asserted governmental interest is substantial, and (3) the regulation directly advances the governmental interest—Rhode Island's regulation fails the final fourth prong because its ban is more extensive than necessary to serve its stated interest. Rhode Island justifies its ban on price advertising on the ground that the ban is intended to keep alcohol prices high as a way to keep consumption low. In order for a speech restriction to pass muster under the fourth prong, there must be a reasonable fit between the legislature's goal and method. *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480. The fit here is not reasonable, since the State has other methods at its disposal—*e. g.*, establishing minimum prices and/or increasing sales taxes on alcoholic beverages—that would more directly accomplish its stated goal without intruding on sellers' ability to provide truthful, nonmisleading information to customers. *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328, 341–344, distinguished. The principal opinion errs in adopting a new analysis for the evaluation of commercial speech regulation. Pp. 528–534.

STEVENS, J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, and VII, in which SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined, the opinion of the Court with respect to Part VIII, in which SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined, an opinion with respect to Parts III and V, in which KENNEDY, SOUTER, and GINSBURG, JJ., joined, an opinion with respect to Part VI, in which KENNEDY, THOMAS, and GINSBURG, JJ., joined, and an opinion with respect to Part IV, in which KENNEDY and GINSBURG, JJ., joined. SCALIA, J., *post,* p. 517, and THOMAS, J., *post,* p. 518, filed opinions concurring in part and concurring in the judgment. O'CONNOR, J., filed an opinion concurring in the judgment, in which REHNQUIST, C. J., and SOUTER and BREYER, JJ., joined, *post,* p. 528.

Evan T. Lawson argued the cause and filed briefs for petitioners.

Rebecca Tedford Partington, Special Assistant Attorney General, argued the cause and filed a brief for respondent State of Rhode Island. *Lauren E. Jones, Caroline Cole Cornwell, William P. Gasbarro,* and *Robert M. Brady* filed a brief for respondent Rhode Island Liquor Stores Association.*

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, VII, and VIII, an opinion with respect to Parts III and V, in which JUSTICE KENNEDY, JUSTICE SOUTER, and

---

*Briefs of *amici curiae* urging reversal were filed for the American Advertising Federation et al. by *Richard E. Wiley, Andrew Krulwich, Howard H. Bell, Daniel E. Troy, John F. Kamp, David S. Versfelt, Slade Metcalf,* and *Robert L. Sherman;* for the American Civil Liberties Union et al. by *Marjorie Heins* and *Steven R. Shapiro;* for the Association of National Advertisers, Inc., et al. by *Burt Neuborne, Gilbert H. Weil, Valerie Schulte,* and *John F. Kamp;* for the Beer Institute et al. by *John J. Walsh, Steven G. Brody,* and *Mary Elizabeth Taylor;* for the Institute for Justice by *William H. Mellor III* and *Clint Bolick;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo, Paul D. Kamenar,* and *Martin H. Redish.*

Briefs of *amici curiae* urging affirmance were filed for the Council of State Governments et al. by *Richard Ruda* and *Lee Fennell;* and for the Malt Beverage Distributors Association of Pennsylvania.

P. Cameron DeVore, John F. Sturm, René P. Milam, Ralph P. Huber, Jerry S. Birenz, Andrew A. Merdek, Jonathan E. Thackeray, and *George Freeman* filed a brief for the Newspaper Association of America et al. as *amici curiae.*

JUSTICE GINSBURG join, an opinion with respect to Part VI, in which JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE GINSBURG join, and an opinion with respect to Part IV, in which JUSTICE KENNEDY and JUSTICE GINSBURG join.

Last Term we held that a federal law abridging a brewer's right to provide the public with accurate information about the alcoholic content of malt beverages is unconstitutional. *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 491 (1995). We now hold that Rhode Island's statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is also invalid. Our holding rests on the conclusion that such an advertising ban is an abridgment of speech protected by the First Amendment and that it is not shielded from constitutional scrutiny by the Twenty-first Amendment.[1]

I

In 1956, the Rhode Island Legislature enacted two separate prohibitions against advertising the retail price of alcoholic beverages. The first applies to vendors licensed in Rhode Island as well as to out-of-state manufacturers, wholesalers, and shippers. It prohibits them from "advertising in any manner whatsoever" the price of any alcoholic beverage offered for sale in the State; the only exception is for price tags or signs displayed with the merchandise within licensed premises and not visible from the street.[2] The second stat-

---

[1] Although the text of the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press," the Amendment applies to the States under the Due Process Clause of the Fourteenth Amendment. See *Board of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico*, 457 U. S. 853, 855, n. 1 (1982); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936); *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925).

[2] Rhode Island Gen. Laws § 3–8–7 (1987) provides:

"Advertising price of malt beverages, cordials, wine or distilled liquor.— No manufacturer, wholesaler, or shipper from without this state and no holder of a license issued under the provisions of this title and chapter ute applies to the Rhode Island news media. It contains a categorical prohibition against the publication or broadcast of any advertisements—even those referring to sales in other States—that "make reference to the price of any alcoholic beverages."[3]

In two cases decided in 1985, the Rhode Island Supreme Court reviewed the constitutionality of these two statutes. In *S&S Liquor Mart, Inc.* v. *Pastore*, 497 A. 2d 729, a liquor retailer located in Westerly, Rhode Island, a town that borders the State of Connecticut, having been advised that his license would be revoked if he advertised his prices in a Connecticut paper, sought to enjoin enforcement of the first statute. Over the dissent of one justice, the court upheld the statute. It concluded that the statute served the substantial state interest in "'the promotion of temperance.'"[4] *Id.*, at

---

shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordials, wine or distilled liquor offered for sale in this state; provided, however, that the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the department."

Regulation 32 of the Rules and Regulations of the Liquor Control Administrator provides that no placard or sign that is visible from the exterior of a package store may make any reference to the price of any alcoholic beverage. App. 2 to Brief for Petitioners.

[3] Rhode Island Gen. Laws § 3–8–8.1 (1987) provides:

"Price advertising by media or advertising companies unlawful.—No newspaper, periodical, radio or television broadcaster or broadcasting company or any other person, firm or corporation with a principal place of business in the state of Rhode Island which is engaged in the business of advertising or selling advertising time or space shall accept, publish, or broadcast any advertisement in this state of the price or make reference to the price of any alcoholic beverages. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor . . . ." The statute authorizes the liquor control administrator to exempt trade journals from its coverage. *Ibid.*

[4] "We also have little difficulty in finding that the asserted governmental interests, herein described as the promotion of temperance and the reasonable control of the traffic in alcoholic beverages, are substantial. We note,

737. Because the plaintiff failed to prove that the statute did not serve that interest, the court held that he had not carried his burden of establishing a violation of the First Amendment. In response to the dissent's argument that the court had placed the burden on the wrong party, the majority reasoned that the Twenty-first Amendment gave the statute "'an added presumption [of] validity.'" *Id.*, at 732. Although that presumption had not been overcome in that case, the State Supreme Court assumed that in a future case the record might "support the proposition that these advertising restrictions do not further temperance objectives." *Id.*, at 734.

In *Rhode Island Liquor Stores Assn.* v. *Evening Call Pub. Co.*, 497 A. 2d 331, the plaintiff association[5] sought to enjoin the publisher of the local newspaper in Woonsocket, Rhode Island, from accepting advertisements disclosing the retail price of alcoholic beverages being sold across the state line in Millville, Massachusetts. In upholding the injunction, the

---

parenthetically, that the word 'temperance' is oftentimes mistaken as a synonym for 'abstinence.' It is not. Webster's Third New International Dictionary (1961) defines 'temperance' as 'moderation in or abstinence from the use of intoxicating drink.' The Rhode Island Legislature has the authority, derived from the state's inherent police power, to enact a variety of laws designed to suppress intemperance or to minimize the acknowledged evils of liquor traffic. Thus, there can be no question that these asserted interests are indeed substantial. *Oklahoma Telecasters Association* v. *Crisp*, 699 F. 2d at 500." *S&S Liquor Mart, Inc.* v. *Pastore*, 497 A. 2d, at 733–734.

In her dissent in *Rhode Island Liquor Stores Assn.* v. *Evening Call Pub. Co.*, 497 A. 2d 331 (R. I. 1985), Justice Murray suggested that the advertising ban was motivated, at least in part, by an interest in protecting small retailers from price competition. *Id.*, at 342, n. 10. This suggestion is consistent with the position taken by respondent Rhode Island Liquor Stores Association in this case. We, however, accept the State Supreme Court's identification of the relevant state interest served by the legislation.

[5] The plaintiff in that case is a respondent in this case and has filed other actions enforcing the price advertising ban. See *id.*, at 333.

State Supreme Court adhered to its reasoning in the *Pastore* case and rejected the argument that the statute neither "directly advanced" the state interest in promoting temperance, nor was "more extensive than necessary to serve that interest" as required by this Court's decision in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 563 (1980). It assumed the existence of other, "perhaps more effective means" of achieving the State's "goal of temperance," but concluded that it was "not unreasonable for the State of Rhode Island to believe that price advertising will result in increased sales of alcoholic beverages generally." *Rhode Island Liquor Stores Assn.* v. *Evening Call Pub. Co.*, 497 A. 2d, at 336.

II

Petitioners 44 Liquormart, Inc. (44 Liquormart), and Peoples Super Liquor Stores, Inc. (Peoples), are licensed retailers of alcoholic beverages. Petitioner 44 Liquormart operates a store in Rhode Island and petitioner Peoples operates several stores in Massachusetts that are patronized by Rhode Island residents. Peoples uses alcohol price advertising extensively in Massachusetts, where such advertising is permitted, but Rhode Island newspapers and other media outlets have refused to accept such ads.

Complaints from competitors about an advertisement placed by 44 Liquormart in a Rhode Island newspaper in 1991 generated enforcement proceedings that in turn led to the initiation of this litigation. The advertisement did not state the price of any alcoholic beverages. Indeed, it noted that "State law prohibits advertising liquor prices." The ad did, however, state the low prices at which peanuts, potato chips, and Schweppes mixers were being offered, identify various brands of packaged liquor, and include the word "WOW" in large letters next to pictures of vodka and rum bottles. Based on the conclusion that the implied reference to bargain prices for liquor violated the statutory ban on price advertising, the Rhode Island Liquor Control Administrator assessed a $400 fine.

After paying the fine, 44 Liquormart, joined by Peoples, filed this action against the administrator in the Federal District Court seeking a declaratory judgment that the two statutes and the administrator's implementing regulations violate the First Amendment and other provisions of federal law. The Rhode Island Liquor Stores Association was allowed to intervene as a defendant and in due course the State of Rhode Island replaced the administrator as the principal defendant. The parties stipulated that the price advertising ban is vigorously enforced, that Rhode Island permits "all advertising of alcoholic beverages excepting references to price outside the licensed premises," and that petitioners' proposed ads do not concern an illegal activity and presumably would not be false or misleading. *44 Liquor Mart, Inc.* v. *Racine*, 829 F. Supp. 543, 545 (RI 1993). The parties disagreed, however, about the impact of the ban on the promotion of temperance in Rhode Island. On that question the District Court heard conflicting expert testimony and reviewed a number of studies.

In his findings of fact, the District Judge first noted that there was a pronounced lack of unanimity among researchers who have studied the impact of advertising on the level of consumption of alcoholic beverages. He referred to a 1985 Federal Trade Commission study that found no evidence that alcohol advertising significantly affects alcohol abuse. Another study indicated that Rhode Island ranks in the upper 30% of States in per capita consumption of alcoholic beverages; alcohol consumption is lower in other States that allow price advertising. After summarizing the testimony of the expert witnesses for both parties, he found "as a fact that Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." *Id.*, at 549.

As a matter of law, he concluded that the price advertising ban was unconstitutional because it did not "directly advance" the State's interest in reducing alcohol consumption and was "more extensive than necessary to serve that interest." *Id.,* at 555. He reasoned that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it and that the Twenty-first Amendment did not shift or diminish that burden. Acknowledging that it might have been reasonable for the state legislature to "assume a correlation between the price advertising ban and reduced consumption," he held that more than a rational basis was required to justify the speech restriction, and that the State had failed to demonstrate a reasonable " 'fit' " between its policy objectives and its chosen means. *Ibid.*

The Court of Appeals reversed. 39 F. 3d 5 (CA1 1994). It found "inherent merit" in the State's submission that competitive price advertising would lower prices and that lower prices would produce more sales. *Id.,* at 7. Moreover, it agreed with the reasoning of the Rhode Island Supreme Court that the Twenty-first Amendment gave the statutes an added presumption of validity. *Id.,* at 8. Alternatively, it concluded that reversal was compelled by this Court's summary action in *Queensgate Investment Co.* v. *Liquor Control Comm'n of Ohio,* 459 U. S. 807 (1982). See 39 F. 3d, at 8. In that case the Court dismissed the appeal from a decision of the Ohio Supreme Court upholding a prohibition against off-premises advertising of the prices of alcoholic beverages sold by the drink. See *Queensgate Investment Co.* v. *Liquor Control Comm'n of Ohio,* 69 Ohio St. 2d 361, 433 N. E. 2d 138 (1982).

Queensgate has been both followed and distinguished in subsequent cases reviewing the validity of similar advertising bans.[6] We are now persuaded that the importance of the First Amendment issue, as well the suggested relevance of the Twenty-first Amendment, merits more thorough analysis than it received when we refused to accept jurisdiction of the *Queensgate* appeal. We therefore granted certiorari. 514 U. S. 1095 (1995).

---

[6] In *Dunagin* v. *Oxford,* 718 F. 2d 738 (1983), the Fifth Circuit distinguished our summary action in *Queensgate* in considering the constitutionality of a sweeping state restriction on outdoor liquor adver-

III

Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. See J. Wood, The Story of Advertising 21, 45–69, 85 (1958); J. Smith, Printers and Press Freedom 49 (1988). Indeed, commercial messages played such a central role in public life prior to the founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados. Franklin, An Apology for Print-

---

tising. The court explained that *Queensgate* did not control because it involved a far narrower alcohol advertising regulation. *Id.*, at 745–746. By contrast, in *Oklahoma Telecasters Assn.* v. *Crisp*, 699 F. 2d 490, 495–497 (1983), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 697 (1984), the Tenth Circuit relied on *Queensgate* in considering a prohibition against broadcasting alcohol advertisements. The Court of Appeals concluded that *Queensgate* stood for the proposition that the Twenty-first Amendment gives the State greater authority to regulate liquor advertising than the First Amendment would otherwise allow. 699 F. 2d, at 495–497.

Other than the two Rhode Island Supreme Court decisions upholding the constitutionality of the statutes at issue in this case, only one published state court opinion has considered our summary action in *Queensgate* in passing on a liquor advertising restriction. See *Michigan Beer & Wine Wholesalers Assn.* v. *Attorney General*, 142 Mich. App. 294, 370 N. W. 2d 328 (1985). There, the Michigan Court of Appeals concluded that *Queensgate* did not control because it involved a far narrower restriction on liquor advertising than the one that Michigan had imposed. 142 Mich. App., at 304–305, 370 N. W. 2d, at 333–335.

ers, June 10, 1731, reprinted in 2 Writings of Benjamin Franklin 172 (1907).

In accord with the role that commercial messages have long played, the law has developed to ensure that advertising provides consumers with accurate information about the availability of goods and services. In the early years, the common law, and later, statutes, served the consumers' interest in the receipt of accurate information in the commercial market by prohibiting fraudulent and misleading advertising. It was not until the 1970's, however, that this Court held that the First Amendment protected the dissemination of truthful and nonmisleading commercial messages about lawful products and services. See generally Kozinski & Banner, The Anti-History and Pre-History of Commercial Speech, 71 Texas L. Rev. 747 (1993).

In *Bigelow* v. *Virginia,* 421 U. S. 809 (1975), we held that it was error to assume that commercial speech was entitled to no First Amendment protection or that it was without value in the marketplace of ideas. *Id.,* at 825–826. The following Term in *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748 (1976), we expanded on our holding in *Bigelow* and held that the State's blanket ban on advertising the price of prescription drugs violated the First Amendment.

Virginia Bd. of Pharmacy reflected the conclusion that the same interest that supports regulation of potentially misleading advertising, namely, the public's interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages. We explained:

> "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we pre-

> serve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." 425 U. S., at 765.[7]

The opinion further explained that a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it:

> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the 'professional' pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.*, at 770.

On the basis of these principles, our early cases uniformly struck down several broadly based bans on truthful, nonmisleading commercial speech, each of which served ends unrelated to consumer protection.[8] Indeed, one of those cases expressly likened the rationale that *Virginia Bd. of Pharmacy* employed to the one that Justice Brandeis adopted in his concurrence in *Whitney* v. *California,* 274 U. S. 357 (1927). See *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 97 (1977). There, Justice Brandeis wrote, in explaining his objection to a prohibition of *political* speech, that "the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney,* 274 U. S., at 377; see also *Carey* v. *Population Services Int'l,* 431 U. S. 678, 701 (1977) (applying test for suppressing political speech set forth in *Brandenburg* v. *Ohio,* 395 U. S. 444, 447 (1969)).

---

[7] By contrast, the First Amendment does not protect commercial speech about unlawful activities. See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376 (1973).

At the same time, our early cases recognized that the State may regulate some types of commercial advertising more freely than other forms of protected speech. Specifically, we explained that the State may require commercial messages to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive," *Virginia Bd. of Pharmacy,* 425 U. S., at 772, n. 24, and that it may restrict some forms of aggressive sales practices that have the potential to exert "undue influence" over consumers, see *Bates* v. *State Bar of Ariz.,* 433 U. S. 350, 366 (1977).

Virginia Bd. of Pharmacy attributed the State's authority to impose these regulations in part to certain "commonsense differences" that exist between commercial messages and other types of protected expression. 425 U. S., at 771, n. 24. Our opinion noted that the greater "objectivity" of commercial speech justifies affording the State more freedom to distinguish false commercial advertisements from true ones, *ibid.*, and that the greater "hardiness" of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation, *ibid.*

---

[8] See *Bates* v. *State Bar of Ariz.,* 433 U. S. 350, 355 (1977) (ban on lawyer advertising); *Carey* v. *Population Services Int'l,* 431 U. S. 678, 700 (1977) (ban on contraceptive advertising); *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 92–94 (1977) (ban on "For Sale" signs); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748 (1976) (ban on prescription drug prices); *Bigelow* v. *Virginia,* 421 U. S. 809, 825 (1975) (ban on abortion advertising). Although *Linmark* involved a prohibition against a particular means of advertising the sale of one's home, we treated the restriction as if it were a complete ban because it did not leave open "satisfactory" alternative channels of communication. 431 U. S., at 92–94.

Subsequent cases explained that the State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is "linked inextricably" to those transactions. *Friedman* v. *Rogers*, 440 U. S. 1, 10, n. 9 (1979); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978) (commercial speech "occurs in an area traditionally subject to government regulation"). As one commentator has explained: "The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services." L. Tribe, American Constitutional Law § 12–15, p. 903 (2d ed. 1988). Nevertheless, as we explained in *Linmark*, the State retains less regulatory authority when its commercial speech restrictions strike at "the substance of the information communicated" rather than the "commercial aspect of [it]—with offerors communicating offers to offerees." 431 U. S., at 96; *Carey* v. *Population Services Int'l*, 431 U. S., at 701, n. 28.

In *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), we took stock of our developing commercial speech jurisprudence. In that case, we considered a regulation "completely" banning all promotional advertising by electric utilities. *Ibid.* Our decision acknowledged the special features of commercial speech but identified the serious First Amendment concerns that attend blanket advertising prohibitions that do not protect consumers from commercial harms.

Five Members of the Court recognized that the state interest in the conservation of energy was substantial, and that there was "an immediate connection between advertising and demand for electricity." *Id.*, at 569. Nevertheless, they concluded that the regulation was invalid because respondent commission had failed to make a showing that a more limited speech regulation would not have adequately served the State's interest. *Id.*, at 571.[9]

In reaching its conclusion, the majority explained that although the special nature of commercial speech may require less than strict review of its regulation, special concerns arise from "regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." *Id.*, at 566, n. 9. In those circumstances, "a ban on speech could screen from public view the underlying governmental policy." *Ibid.* As a result, the Court concluded that "special care" should attend the review of such blanket bans, and it pointedly remarked that "in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Ibid.*[10]

---

[9] In other words, the regulation failed the fourth step in the four-part inquiry that the majority announced in its opinion. It wrote:

"In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U. S., at 566.

[10] The Justices concurring in the judgment adopted a somewhat broader view. They expressed "doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to 'dampen' the demand for or use of the product." *Id.*, at 574. Indeed, Justice Blackmun believed that even

IV

As our review of the case law reveals, Rhode Island errs in concluding that *all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them. See *Rubin* v. *Coors Brewing Co.*, 514 U. S., at 491–494 (STEVENS, J., concurring in judgment).

When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

Sound reasons justify reviewing the latter type of commercial speech regulation more carefully. Most obviously, complete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression, see *Kovacs* v. *Cooper*, 336 U. S. 77, 89 (1949), are particularly dangerous because they all but foreclose alternative means of disseminating certain information.

Our commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppression. For example, in *Linmark*, 431 U. S., at 92–94, we concluded that a ban on "For Sale" signs

---

"though 'commercial' speech is involved, such a regulation strikes at the heart of the First Amendment." *Ibid.*

was "content based" and failed to leave open "satisfactory" alternative channels of communication; see also *Virginia Bd. of Pharmacy,* 425 U. S., at 771. Moreover, last Term we upheld a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers. *Florida Bar* v. *Went For It, Inc.,* 515 U. S. 618, 633–634 (1995).[11]

The special dangers that attend complete bans on truthful, nonmisleading commercial speech cannot be explained away by appeals to the "commonsense distinctions" that exist between commercial and noncommercial speech. *Virginia Bd. of Pharmacy,* 425 U. S., at 771, n. 24. Regulations that suppress the truth are no less troubling because they target objectively verifiable information, nor are they less effective because they aim at durable messages. As a result, neither the "greater objectivity" nor the "greater hardiness" of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference. *Ibid.*

It is the State's interest in protecting consumers from "commercial harms" that provides "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech." *Cincinnati* v. *Discovery Network, Inc.,* 507 U. S. 410, 426 (1993). Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms.[12] Instead, such bans often serve only to obscure an "underlying governmental policy" that could be implemented without regulating speech. *Central Hudson,* 447 U. S., at 566, n. 9. In this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy. See *id.,* at 575 (Blackmun, J., concurring in judgment).[13]

---

[11] "Florida permits lawyers to advertise on prime-time television and radio as well as in newspapers and other media. They may rent space on billboards. They may send untargeted letters to the general population, or to discrete segments thereof. There are, of course, pages upon pages devoted to lawyers in the Yellow Pages of Florida telephone directories. These listings are organized alphabetically and by area of specialty. See generally Rule 4–7.2(a), Rules Regulating The Florida Bar ('[A] lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, billboards, and other signs, radio, television, and recorded messages the public may access by dialing a telephone number, or through written communication not involving solicitation as defined in rule 4–7.4'); *The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar—Advertising Issues,* 571 So. 2d, at 461." 515 U. S., at 633–634.

Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth. *Linmark,* 431 U. S., at 96. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products:

> "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the gov-

---

[12] In *Discovery Network,* we held that the city's categorical ban on commercial newsracks attached too much importance to the distinction between commercial and noncommercial speech. After concluding that the esthetic and safety interests served by the newsrack ban bore no relationship whatsoever to the prevention of commercial harms, we rejected the State's attempt to justify its ban on the sole ground that it targeted commercial speech. See 507 U. S., at 428.

[13] This case bears out the point. Rhode Island seeks to reduce alcohol consumption by increasing alcohol price; yet its means of achieving that goal deprives the public of their chief source of information about the reigning price level of alcohol. As a result, the State's price advertising ban keeps the public ignorant of the key barometer of the ban's effectiveness: the alcohol beverages' prices.

> ernment, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment. See *Virginia State Bd. of Pharmacy, supra,* at 762." *Edenfield* v. *Fane,* 507 U. S. 761, 767 (1993).

See also *Linmark,* 431 U. S., at 96 (1977); *Rubin* v. *Coors Brewing Co.,* 514 U. S., at 497–498 (STEVENS, J., concurring in judgment); Tribe, American Constitutional Law § 12–2, at 790, and n. 11.

V

In this case, there is no question that Rhode Island's price advertising ban constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product. There is also no question that the ban serves an end unrelated to consumer protection. Accordingly, we must review the price advertising ban with "special care," *Central Hudson,* 447 U. S., at 566, n. 9, mindful that speech prohibitions of this type rarely survive constitutional review, *ibid.*

The State argues that the price advertising prohibition should nevertheless be upheld because it directly advances the State's substantial interest in promoting temperance, and because it is no more extensive than necessary. Cf. *id.,* at 566. Although there is some confusion as to what Rhode Island means by temperance, we assume that the State asserts an interest in reducing alcohol consumption.[14]

---

[14] Before the District Court, the State argued that it sought to reduce consumption among irresponsible drinkers. App. 67. In its brief to this Court, it equates its interest in promoting temperance with an interest in reducing alcohol consumption among all drinkers. See, *e. g.,* Brief for Respondents 28. The Rhode Island Supreme Court has characterized the State's interest in "promoting temperance" as both "the state's interest in reducing the consumption of liquor," *S&S Liquormart, Inc.* v. *Pastore,* 497 A. 2d 729, 734 (1985), and the State's interest in discouraging "excessive consumption of alcoholic beverages," *id.,* at 735. A state statute declares the ban's purpose to be "the promotion of temperance and for the rea-

In evaluating the ban's effectiveness in advancing the State's interest, we note that a commercial speech regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.*, at 564. For that reason, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so "to a material degree." *Edenfield*, 507 U. S., at 771; see also *Rubin* v. *Coors Brewing Co.*, 514 U. S., at 486–488. The need for the State to make such a showing is particularly great given the drastic nature of its chosen means—the wholesale suppression of truthful, nonmisleading information. Accordingly, we must determine whether the State has shown that the price advertising ban will *significantly* reduce alcohol consumption.

We can agree that common sense supports the conclusion that a prohibition against price advertising, like a collusive agreement among competitors to refrain from such advertising,[15] will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market. Despite the absence of proof on the point, we can even agree with the State's contention that it is reasonable to assume that demand, and hence consumption throughout the market, is somewhat lower whenever a higher, noncompetitive price level prevails. However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance.

---

sonable control of the traffic in alcoholic beverages." R. I. Gen. Laws §3-1-5 (1987).

[15] See, *e. g., Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 735 (1988) (considering restriction on price advertising as evidence of Sherman Act violation); *United States* v. *Sealy, Inc.*, 388 U. S. 350, 355 (1967) (same); *Blackburn* v. *Sweeney*, 53 F. 3d 825, 828 (CA7 1995) (considering restrictions on the location of advertising as evidence of Sherman Act violation).

Although the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, 829 F. Supp., at 546, the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce marketwide consumption.[16] Indeed, the District Court's considered and uncontradicted finding on this point is directly to the contrary. *Id.*, at 549.[17] Moreover, the evidence suggests that the abusive drinker will probably not be deterred by a marginal price increase, and that the true alcoholic may simply reduce his purchases of other necessities.

In addition, as the District Court noted, the State has not identified what price level would lead to a significant reduction in alcohol consumption, nor has it identified the amount that it believes prices would decrease without the ban. *Ibid.* Thus, the State's own showing reveals that any connection between the ban and a significant change in alcohol consumption would be purely fortuitous.

---

[16] Petitioners' stipulation that they each expect to realize a $100,000 benefit per year if the ban is lifted is not to the contrary. App. 47. The stipulation shows only that petitioners believe they will be able to compete more effectively for existing alcohol consumers if there is no ban on price advertising. It does not show that they believe either the number of alcohol consumers, or the number of purchases by those consumers, will increase in the ban's absence. Indeed, the State's own expert conceded that "plaintiffs' expectation of realizing additional profits through price advertising has no necessary relationship to increased overall consumption." 829 F. Supp., at 549.

Moreover, we attach little significance to the fact that some studies suggest that people budget the amount of money that they will spend on alcohol. 39 F. 3d 5, 7 (CA1 1994). These studies show only that, in a competitive market, people will tend to search for the cheapest product in order to meet their budgets. The studies do not suggest that the amount of money budgeted for alcohol consumption will remain fixed in the face of a marketwide price increase.

[17] Although the Court of Appeals concluded that the regulation directly advanced the State's interest, it did not dispute the District Court's conclusion that the evidence suggested that, at most, a price advertising ban would have a marginal impact on overall alcohol consumption. *Id.*, at 7–8; cf. *Michigan Beer & Wine Wholesalers Assn.* v. *Attorney General*, 142 Mich. App., at 311, 370 N. W. 2d, at 336 (explaining that "any additional impact on the level of consumption attributable to the absence of price advertisements would be negligible").

As is evident, any conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of "speculation or conjecture" that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest. *Edenfield,* 507 U. S., at 770.[18] Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends.

The State also cannot satisfy the requirement that its restriction on speech be no more extensive than necessary. It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation. 829 F. Supp., at 549. Per capita purchases could be limited as is the case with prescription drugs. Even educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.

As a result, even under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a "reasonable fit" between its abridgment of speech and its temperance goal. *Board of Trustees of State Univ. of N. Y.* v. *Fox,* 492 U. S. 469, 480 (1989); see also

---

[18] Outside the First Amendment context, we have refused to uphold alcohol advertising bans premised on similarly speculative assertions about their impact on consumption. See *Capital Cities Cable, Inc.* v. *Crisp,* 467 U. S., at 715–716 (holding ban pre-empted by Federal Communications Commission regulations); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U. S. 97 (1980) (holding ban violated the Sherman Act). It would be anomalous if the First Amendment were more tolerant of speech bans than federal regulations and statutes.

Rubin v. *Coors Brewing Co.*, 514 U. S., at 491 (explaining that defects in a federal ban on alcohol advertising are "further highlighted by the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech"); *Linmark*, 431 U. S., at 97 (suggesting that the State use financial incentives or counterspeech, rather than speech restrictions, to advance its interests). It necessarily follows that the price advertising ban cannot survive the more stringent constitutional review that *Central Hudson* itself concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech. 447 U. S., at 566, n. 9.

VI

The State responds by arguing that it merely exercised appropriate "legislative judgment" in determining that a price advertising ban would best promote temperance. Relying on the *Central Hudson* analysis set forth in *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328 (1986), and *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418 (1993), Rhode Island first argues that, because expert opinions as to the effectiveness of the price advertising ban "go both ways," the Court of Appeals correctly concluded that the ban constituted a "reasonable choice" by the legislature. 39 F. 3d, at 7. The State next contends that precedent requires us to give particular deference to that legislative choice because the State could, if it chose, ban the sale of alcoholic beverages outright. See *Posadas*, 478 U. S., at 345–346. Finally, the State argues that deference is appropriate because alcoholic beverages are so-called "vice" products. See *Edge*, 509 U. S., at 426; *Posadas*, 478 U. S., at 346–347. We consider each of these contentions in turn.

The State's first argument fails to justify the speech prohibition at issue. Our commercial speech cases recognize some room for the exercise of legislative judgment. See *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 507–508 (1981). However, Rhode Island errs in concluding that *Edge* and

Posadas establish the degree of deference that its decision to impose a price advertising ban warrants.

In *Edge*, we upheld a federal statute that permitted only those broadcasters located in States that had legalized lotteries to air lottery advertising. The statute was designed to regulate advertising about an activity that had been deemed illegal in the jurisdiction in which the broadcaster was located. 509 U. S., at 433–434. Here, by contrast, the commercial speech ban targets information about entirely lawful behavior.

Posadas is more directly relevant. There, a five-Member majority held that, under the *Central Hudson* test, it was "up to the legislature" to choose to reduce gambling by suppressing in-state casino advertising rather than engaging in educational speech. *Posadas*, 478 U. S., at 344. Rhode Island argues that this logic demonstrates the constitutionality of its own decision to ban price advertising in lieu of raising taxes or employing some other less speech-restrictive means of promoting temperance.

The reasoning in *Posadas* does support the State's argument, but, on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis. The casino advertising ban was designed to keep truthful, nonmisleading speech from members of the public for fear that they would be more likely to gamble if they received it. As a result, the advertising ban served to shield the State's antigambling policy from the public scrutiny that more direct, nonspeech regulation would draw. See *id.*, at 351 (Brennan, J., dissenting).

Given our longstanding hostility to commercial speech regulation of this type, *Posadas* clearly erred in concluding that it was "up to the legislature" to choose suppression over a less speech-restrictive policy. The *Posadas* majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available. See *id.*, at 350 (Brennan, J., dissenting) (listing cases); Kurland, Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful," 1986 S. Ct. Rev. 1, 12–15.

Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach. Instead, in keeping with our prior holdings, we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate. As we explained in *Virginia Bd. of Pharmacy*, "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U. S., at 770.

We also cannot accept the State's second contention, which is premised entirely on the "greater-includes-the-lesser" reasoning endorsed toward the end of the majority's opinion in *Posadas.* There, the majority stated that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 478 U. S., at 345–346. It went on to state that "*because* the government could have enacted a wholesale prohibition of [casino gambling] it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." *Id.*, at 346. The majority concluded that it would "surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand." *Ibid.* On the basis of these statements, the State reasons that its undisputed authority to ban alcoholic beverages must include the power to restrict advertisements offering them for sale.

In *Rubin* v. *Coors Brewing Co.,* 514 U. S. 476 (1995), the United States advanced a similar argument as a basis for supporting a statutory prohibition against revealing the alcoholic content of malt beverages on product labels. We rejected the argument, noting that the statement in the *Posadas* opinion was made only after the majority had concluded that the Puerto Rican regulation "survived the *Central Hudson* test." 514 U. S., at 483, n. 2. Further consideration persuades us that the "greater-includes-the-lesser" argument should be rejected for the additional and more important reason that it is inconsistent with both logic and well-settled doctrine.

Although we do not dispute the proposition that greater powers include lesser ones, we fail to see how that syllogism requires the conclusion that the State's power to regulate commercial *activity* is "greater" than its power to ban truthful, nonmisleading commercial *speech.* Contrary to the assumption made in *Posadas,* we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct. As a venerable proverb teaches, it may prove more injurious to prevent people from teaching others how to fish than to prevent fish from being sold.[19] Similarly, a local ordinance banning bicycle lessons may curtail freedom far more than one that prohibits bicycle riding within city limits. In short, we reject the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily "greater" than the power to suppress speech about it.

---

[19] "Give a man a fish, and you feed him for a day. Teach a man to fish, and you feed him for a lifetime." The International Thesaurus of Quotations 646 (compiled by R. Tripp 1970).

As a matter of First Amendment doctrine, the *Posadas* syllogism is even less defensible. The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.

These basic First Amendment principles clearly apply to commercial speech; indeed, the *Posadas* majority impliedly conceded as much by applying the *Central Hudson* test. Thus, it is no answer that commercial speech concerns products and services that the government may freely regulate. Our decisions from *Virginia Bd. of Pharmacy* on have made plain that a State's regulation of the sale of goods differs in kind from a State's regulation of accurate information about those goods. The distinction that our cases have consistently drawn between these two types of governmental action is fundamentally incompatible with the absolutist view that the State may ban commercial speech simply because it may constitutionally prohibit the underlying conduct.[20]

---

[20] It is also no answer to say that it would be "strange" if the First Amendment tolerated a seemingly "greater" regulatory measure while forbidding a "lesser" one. We recently held that although the government had the power to proscribe an entire category of speech, such as obscenity or so-called fighting words, it could not limit the scope of its ban to obscene or fighting words that expressed a point of view with which the government disagrees. *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992). Similarly, in *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410 (1993), we assumed that States could prevent all newsracks from being placed on public sidewalks, but nevertheless concluded that they could not ban only those newsracks that contained certain commercial publications. *Id.*, at 428.

That the State has chosen to license its liquor retailers does not change the analysis. Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right. See, *e. g., Frost & Frost Trucking Co.* v. *Railroad Comm'n of Cal.,* 271 U. S. 583, 594 (1926). In *Perry* v. *Sindermann,* 408 U. S. 593 (1972), relying on a host of cases applying that principle during the preceding quarter century, the Court explained that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." *Id.,* at 597. That teaching clearly applies to state attempts to regulate commercial speech, as our cases striking down bans on truthful, nonmisleading speech by licensed professionals attest. See, *e. g., Bates* v. *State Bar of Ariz.,* 433 U. S., at 355; *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748 (1976).

Thus, just as it is perfectly clear that Rhode Island could not ban all obscene liquor ads except those that advocated temperance, we think it equally clear that its power to ban the sale of liquor entirely does not include a power to censor all advertisements that contain accurate and nonmisleading information about the price of the product. As the entire Court apparently now agrees, the statements in the *Posadas* opinion on which Rhode Island relies are no longer persuasive.

Finally, we find unpersuasive the State's contention that, under *Posadas* and *Edge,* the price advertising ban should be upheld because it targets commercial speech that pertains to a "vice" activity. Respondents premise their request for a so-called "vice" exception to our commercial speech doctrine on language in *Edge* which characterized gambling as a "vice." *Edge,* 509 U. S., at 426; see also *Posadas,* 478 U. S., at 346–347. Respondents misread our precedent. Our decision last Term striking down an alcohol-related advertising restriction effectively rejected the very contention respondents now make. See *Rubin* v. *Coors Brewing Co.,* 514 U. S., at 478, 482, n. 2.

Moreover, the scope of any "vice" exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to "vice activity." Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market. The recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the "vice" label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice. See Kurland, 1986 S. Ct. Rev., at 15. For these reasons, a "vice" label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.

VII

From 1919 until 1933, the Eighteenth Amendment to the Constitution totally prohibited "the manufacture, sale, or transportation of intoxicating liquors" in the United States and its territories. Section 1 of the Twenty-first Amendment repealed that prohibition, and §2 delegated to the several States the power to prohibit commerce in, or the use of, alcoholic beverages.[21] The States' regulatory power over this segment of commerce is therefore largely "unfettered by the Commerce Clause." *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132, 138 (1939).

---

[21] "Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U. S. Const., Amdt. 21, §2.

As is clear, the text of the Twenty-first Amendment supports the view that, while it grants the States authority over commerce that might otherwise be reserved to the Federal Government, it places no limit whatsoever on other constitutional provisions. Nevertheless, Rhode Island argues, and the Court of Appeals agreed, that in this case the Twenty-first Amendment tilts the First Amendment analysis in the State's favor. See 39 F. 3d, at 7–8.

In reaching its conclusion, the Court of Appeals relied on our decision in *California* v. *LaRue,* 409 U. S. 109 (1972).[22] In *LaRue,* five Members of the Court relied on the Twenty-first Amendment to buttress the conclusion that the First Amendment did not invalidate California's prohibition of certain grossly sexual exhibitions in premises licensed to serve alcoholic beverages. Specifically, the opinion stated that the Twenty-first Amendment required that the prohibition be given an added presumption in favor of its validity. See *id.,* at 118–119. We are now persuaded that the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment.

Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases, the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of "bacchanalian revelries" described in the *LaRue* opinion regardless of whether alcoholic beverages are involved. *Id.,* at 118; see, *e. g., Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50 (1976); *Barnes* v. *Glen Theatre, Inc.,* 501 U. S. 560 (1991). As we recently noted: "*LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." *Rubin* v. *Coors Brewing Co.*, 514 U. S., at 483, n. 2.

---

[22] The State also relies on two *per curiam* opinions that followed the Twenty-first Amendment analysis set forth in *LaRue.* See *New York State Liquor Authority* v. *Bellanca,* 452 U. S. 714 (1981), and *Newport* v. *Iacobucci,* 479 U. S. 92 (1986).

Without questioning the holding in *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment. As we explained in a case decided more than a decade after *LaRue*, although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 712 (1984). That general conclusion reflects our specific holdings that the Twenty-first Amendment does not in any way diminish the force of the Supremacy Clause, *ibid.; California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 112–114 (1980), the Establishment Clause, *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 122, n. 5 (1982), or the Equal Protection Clause, *Craig* v. *Boren*, 429 U. S. 190, 209 (1976). We see no reason why the First Amendment should not also be included in that list. Accordingly, we now hold that the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment. The Twenty-first Amendment, therefore, cannot save Rhode Island's ban on liquor price advertising.

VIII

Because Rhode Island has failed to carry its heavy burden of justifying its complete ban on price advertising, we conclude that R. I. Gen. Laws §§ 3–8–7 and 3–8–8.1 (1987), as well as Regulation 32 of the Rhode Island Liquor Control Administration, abridge speech in violation of the First Amendment as made applicable to the States by the Due Process Clause of the Fourteenth Amendment. The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I share JUSTICE THOMAS's discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it. I also share JUSTICE STEVENS's aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them. On the other hand, it would also be paternalism for us to prevent the people of the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them. I will take my guidance as to what the Constitution forbids, with regard to a text as indeterminate as the First Amendment's preservation of "the freedom of speech," and where the core offense of suppressing particular political ideas is not at issue, from the long accepted practices of the American people. See *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 375 (1995) (SCALIA, J., dissenting).

The briefs and arguments of the parties in the present case provide no illumination on that point; understandably so, since both sides accepted *Central Hudson*. The *amicus* brief on behalf of the American Advertising Federation et al. did examine various expressions of view at the time the First Amendment was adopted; they are consistent with First Amendment protection for commercial speech, but certainly not dispositive. I consider more relevant the state legislative practices prevalent at the time the First Amendment was adopted, since almost all of the States had free speech constitutional guarantees of their own, whose meaning was not likely to have been different from the federal constitutional provision derived from them. Perhaps more relevant still are the state legislative practices at the time the Fourteenth Amendment was adopted, since it is most improbable that that adoption was meant to overturn any existing national consensus regarding free speech. Indeed, it is rare that any nationwide practice would develop contrary to a proper understanding of the First Amendment itself—for which reason I think also relevant any national consensus that had formed regarding state regulation of advertising *after* the Fourteenth Amendment, and before this Court's entry into the field. The parties and their *amici* provide no evidence on these points.

Since I do not believe we have before us the wherewithal to declare *Central Hudson* wrong—or at least the wherewithal to say what ought to replace it—I must resolve this case in accord with our existing jurisprudence, which all except JUSTICE THOMAS agree would prohibit the challenged regulation. I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court. I believe, however, that JUSTICE STEVENS's treatment of the application of the Twenty-first Amendment to this case is correct, and accordingly join Parts I, II, VII, and VIII of JUSTICE STEVENS's opinion.

JUSTICE THOMAS, concurring in Parts I, II, VI, and VII, and concurring in the judgment.

In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), should not be applied, in my view. Rather, such an "interest" is *per se* illegitimate and can no more justify regulation of "commercial" speech than it can justify regulation of "noncommercial" speech.

I

In *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762 (1976), this Court held that speech that does " 'no more than propose a commercial transaction' " was protected by the First Amendment, and struck down a ban on price advertising regarding prescription drugs. The Court asserted that a "particular consumer's interest in the free flow of commercial information" may be as keen as, or keener than, his interest in "the day's most urgent political debate," *id.*, at 763, and that "the proper allocation of resources" in our free enterprise system requires that consumer decisions be "intelligent and well informed," *id.*, at 765. The Court also explained that, unless consumers are kept informed about the operations of the free market system, they cannot form "intelligent opinions as to how that system ought to be regulated or altered." *Ibid.* See also *id.*, at 765–766, nn. 19–20.[1] The Court sharply rebuffed the State's argument that consumers would make irresponsible choices if they were able to choose between higher priced but higher quality pharmaceuticals accompanied by high quality prescription monitoring services resulting from a "stable pharmacist-customer relationshi[p]," *id.*, at 768, on the one hand, and cheaper but lower quality pharmaceuticals unaccompanied by such services, on the other:

> "[T]he State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.
>
> . . . . .
>
> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests, if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the

---

[1] Accord, *Virginia Bd. of Pharmacy*, 425 U. S., at 780, n. 8 (Stewart, J., concurring) (information about price and products conveyed by advertising may stimulate thought and debate about political questions).

> First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is." *Id.*, at 769–770 (citation omitted).

The Court opined that *false or misleading* advertising was not protected, on the grounds that the accuracy of advertising claims may be more readily verifiable than is the accuracy of political or other claims, and that "commercial" speech is made more durable by its profit motive. *Id.*, at 771, and n. 24. The Court also made clear that it did not envision protection for advertising that proposes an illegal transaction. *Id.*, at 772–773 (distinguishing *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376 (1973)).

In case after case following *Virginia Bd. of Pharmacy*, the Court, and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing "commercial" speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.[2]

---

[2] See *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 96–97 (1977); *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 364–365, 368–369, 374–375, 376–377 (1977); *Friedman* v. *Rogers*, 440 U. S. 1, 8–9 (1979); *id.*, at 23–24

In other decisions, however, the Court has appeared to accept the legitimacy of laws that suppress information in order to manipulate the choices of consumers—so long as the government could show that the manipulation was in fact successful. *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), was the first decision to clearly embrace this position, although the Court applied a very strict overbreadth analysis to strike down the advertising ban at issue.[3] In two other decisions, *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328 (1986), and *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418 (1993), the Court simply presumed that advertising of a product or service leads to increased consumption; since, as in *Central Hudson*, the Court saw nothing impermissible in the government's suppressing information in order to discourage consumption, it upheld the advertising restrictions

---

(Blackmun, J., for two Justices, concurring in part and dissenting in part); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 561–562 (1980); *id.*, at 566, n. 9; *id.*, at 575 (Blackmun, J., joined by Brennan, J., concurring in judgment); *id.*, at 581 (STEVENS, J., also joined by Brennan, J., concurring in judgment); *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 79 (1983) (REHNQUIST, J., for two Justices, concurring in judgment); *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 646 (1985); *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328, 350–351, 358 (1986) (Brennan, J., for three Justices, dissenting); *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 421–422, n. 17 (1993); *id.*, at 432 (Blackmun, J., concurring); *Edenfield* v. *Fane*, 507 U. S. 761, 767, 770 (1993); *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418, 437–439, and nn. 1, 3, 4 (1993) (STEVENS, J., for two Justices, dissenting); *Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U. S. 136, 142–143 (1994); *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 481–482 (1995); *id.*, at 492–493, 494 (STEVENS, J., concurring in judgment); *Florida Bar* v. *Went For It, Inc.*, 515 U. S. 618, 639–640, 644–645 (1995) (KENNEDY, J., for four Justices, dissenting).

[3] The Court found that although the total effect of the advertising ban would be to decrease consumption, the advertising ban impermissibly extended to some advertising that itself might not increase consumption. *Central Hudson*, *supra*, at 569–571.

in those cases. *Posadas, supra,* at 341–342; *Edge, supra,* at 425, 433–434.

The Court has at times appeared to assume that "commercial" speech could be censored in a variety of ways for any of a variety of reasons because, as was said without clear rationale in some post-*Virginia Bd. of Pharmacy* cases, such speech was in a "subordinate position in the scale of First Amendment values," *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978); *Board of Trustees of State Univ. of N. Y.* v. *Fox,* 492 U. S. 469, 478 (1989); *Florida Bar* v. *Went For It, Inc.*, 515 U. S. 618, 623 (1995), or of "less constitutional moment," *Central Hudson, supra,* at 562–563, n. 5. But see *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 418–419 (1993) (rejecting this assertion); *id.*, at 431 (Blackmun, J., concurring) (same). I do not see a philosophical or historical basis for asserting that "commercial" speech is of "lower value" than "noncommercial" speech. Indeed, some historical materials suggest to the contrary. See, *e. g., ante,* at 495–496 (citing Franklin's Apology for Printers); *Ex parte Jackson,* 96 U. S. 727, 733 (1878) (dictum that Congress could not, consistent with freedom of the press, prevent the circulation of lottery advertising through methods other than the United States mail); see also *In re Rapier,* 143 U. S. 110, 134–135 (1892) (continuing to assume that freedom of the press prevents Congress from prohibiting circulation of newspapers containing lottery advertisements); *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, 315 (1913) (same); see generally Brief for American Advertising Federation et al. as *Amici Curiae* 12–24 (citing authorities for propositions that commercial activity and advertising were integral to life in colonial America and that Framers' political philosophy equated liberty and property and did not distinguish between commercial and noncommercial messages). Nor do I believe that the only explanations that the Court has ever advanced for treating "commercial" speech differently from other speech can justify restricting "commercial" speech in order to keep information from legal purchasers so as to thwart what would otherwise be their choices in the marketplace.[4]

II

I do not join the principal opinion's application of the *Central Hudson* balancing test because I do not believe that such a test should be applied to a restriction of "commercial" speech, at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark.[5] Application of the advancement-of-state-interest prong of *Central Hudson* makes little sense to me in such circumstances. Faulting the State for failing to show that its price advertising ban decreases alcohol consumption "significantly," as JUSTICE STEVENS does, *ante*, at 507 (emphasis deleted), seems to imply that if the State had been *more successful* at keeping consumers ignorant and thereby decreasing their consumption, then the restriction might have been upheld. This contradicts *Virginia Bd. of*

---

[4] As noted above, the asserted rationales for differentiating "commercial" speech from other speech are (1) that the truth of "commercial" speech is supposedly more verifiable, and (2) that "commercial speech, the offspring of economic self-interest" is supposedly a "hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation." *Central Hudson, supra,* at 564, n. 6 (internal quotation marks omitted). The degree to which these rationales truly justify treating "commercial" speech differently from other speech (or indeed, whether the requisite distinction can even be drawn) is open to question, in my view. See Kozinski & Banner, Who's Afraid of Commercial Speech, 76 Va. L. Rev. 627, 634–638 (1990) (questioning basis for drawing distinction); *id.*, at 638–650 (questioning coherence of distinction). In any event, neither of these rationales provides any basis for permitting government to keep citizens ignorant as a means of manipulating their choices in the commercial or political marketplace.

[5] In other words, I do not believe that a *Central Hudson*-type balancing test should apply when the asserted purpose is like the one put forth by the government in *Central Hudson* itself. Whether some type of balancing test is warranted when the asserted state interest is of a different kind is a question that I do not consider here.

Pharmacy's rationale for protecting "commercial" speech in the first instance.

Both JUSTICE STEVENS and JUSTICE O'CONNOR appear to adopt a stricter, more categorical interpretation of the fourth prong of *Central Hudson* than that suggested in some of our other opinions,[6] one that could, as a practical matter, go a long way toward the position I take. The State argues that keeping information about lower priced alcohol from consumers will tend to raise the total price of alcohol to consumers (defined as money price plus the costs of searching out lower priced alcohol, see Brief for Respondents 23), thus discouraging alcohol consumption. In their application of the fourth prong, both JUSTICE STEVENS and JUSTICE O'CONNOR hold that because the State can ban the sale of lower priced alcohol altogether by instituting minimum prices or levying taxes, it cannot ban advertising regarding lower priced liquor. Although the tenor of JUSTICE O'CONNOR's opinion (and, to a lesser extent, that of JUSTICE STEVENS' opinion) might suggest that this is just another routine case-by-case application of *Central Hudson's* fourth prong, the Court's holding will in fact be quite sweeping if applied consistently in future cases. The opinions would appear to commit the courts to striking down restrictions on speech whenever a direct regulation (*i. e.*, a regulation involving no restriction on speech regarding lawful activity at all) would be an equally effective method of dampening demand by legal users. But it would seem that directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be, and thus virtually all restrictions with such a purpose would fail the fourth prong of the *Central Hudson* test.

---

[6] *E. g., Cincinnati* v. *Discovery Network,* 507 U. S., at 417, n. 13 (commercial speech restrictions impermissible if alternatives are "numerous" and obvious).

This would be so even if the direct regulation is, in one sense, more restrictive of *conduct* generally. In this case, for example, adoption of minimum prices or taxes will mean that those who, under the current legal system, would have happened across cheap liquor or would have sought it out, will be forced to pay more. Similarly, a State seeking to discourage liquor sales would have to ban sales by convenience stores rather than banning convenience store liquor advertising; it would have to ban liquor sales after midnight, rather than banning advertising by late-night liquor sellers; and so on.

The upshot of the application of the fourth prong in the opinions of JUSTICE STEVENS and of JUSTICE O'CONNOR seems to be that the government may not, for the purpose of keeping would-be consumers ignorant and thus decreasing demand, restrict advertising regarding commercial transactions—or at least that it may not restrict advertising regarding commercial transactions except to the extent that it outlaws or otherwise directly restricts the same transactions within its own borders.[7] I welcome this outcome; but,

---

[7] The two most obvious situations in which no equally effective direct regulation will be available for discouraging consumption (and thus, the two situations in which the Court and I might differ on the outcome) are: (1) When a law directly regulating conduct would violate the Constitution (*e. g.*, because the item is constitutionally protected), or (2) when the sale is to occur outside the State's borders.

As to the first situation: Although the Court's application of the fourth prong today does not specifically foreclose regulations or bans of advertising regarding items that cannot constitutionally be banned, it would seem strange to hold that the government's power to interfere with transmission of information regarding these items, in order to dampen demand for them, is more extensive than its power to restrict, for the same purpose, advertising of items that are not constitutionally protected. Cf. *Bigelow* v. *Virginia*, 421 U. S. 809, 822 (1975).

As to the second situation: When a State seeks to dampen consumption by its citizens of products or services outside its borders, it does not have the option of direct regulation. Here, a respondent correctly points out that alternatives such as taxes will *not* be effective in discouraging sales rather than "applying" the fourth prong of *Central Hudson* to reach the inevitable result that all or most such advertising restrictions must be struck down, I would adhere to the doctrine adopted in *Virginia Bd. of Pharmacy* and in Justice Blackmun's *Central Hudson* concurrence, that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.

III

Although the Court took a sudden turn away from *Virginia Bd. of Pharmacy* in *Central Hudson*, it has never explained why manipulating the choices of consumers by keeping them ignorant is more legitimate when the ignorance is maintained through suppression of "commercial" speech than when the same ignorance is maintained through suppression of "noncommercial" speech. The courts, including this

---

to Rhode Island residents of lower priced alcohol outside the State, see Brief for Respondent Rhode Island Liquor Stores Association 27; yet the Court strikes down the ban against price advertising even as applied to out-of-state liquor sellers such as petitioner Peoples Super Liquor Stores. Perhaps JUSTICE STEVENS and JUSTICE O'CONNOR would distinguish a situation in which a State had actually banned sales of lower priced alcohol within the State and had then, through a ban of advertising by out-of-state sellers, sought to keep residents ignorant of the fact that lower priced alcohol was legally available in other States. Cf. *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418 (1993). See *ante*, at 508–510.

The outcome in *Edge* may well be in conflict with the principles espoused in *Virginia Bd. of Pharmacy* and ratified by me today. See *Edge*, *supra*, at 436–439 (STEVENS, J., dissenting). (In *Edge*, respondent did not put forth the broader principles adopted in *Virginia Bd. of Pharmacy*, but rather argued that the advertising restriction did not have a sufficiently close fit under *Central Hudson*.) Because the issue of restrictions on advertising of products or services to be purchased legally outside a State that has itself banned or regulated the same purchases within the State is not squarely presented in this case, I will not address here whether the decision in *Edge* can be reconciled with the position I take today.

Court, have found the *Central Hudson* "test" to be, as a general matter, very difficult to apply with any uniformity.[8] This may result in part from the inherently nondeterminative nature of a case-by-case balancing "test" unaccompanied by any categorical rules, and the consequent likelihood that individual judicial preferences will govern application of the test.[9] Moreover, the second prong of *Central Hudson*, as applied to the facts of that case and to those here, apparently requires judges to delineate those situations in which citizens cannot be trusted with information, and invites judges to decide whether they themselves think that consumption of a product is harmful enough that it *should* be discouraged.[10] In my view, the *Central Hudson* test asks the courts to weigh incommensurables—the value of knowledge versus the value of ignorance—and to apply contradictory premises—that informed adults are the best judges of their own interests, and that they are not. Rather than continuing to apply a test that makes no sense to me when the asserted state interest is of the type involved here, I would return to the reasoning and holding of *Virginia Bd. of Pharmacy.* Under that decision, these restrictions fall.

---

[8] See, *e. g.*, Kozinski & Banner, 76 Va. L. Rev., at 630–631 (citing cases); Wright, Freedom and Culture: Why We Should Not Buy Commercial Speech, 72 Denver U. L. Rev. 137, 162–166 (1994) (citing cases); Kasakove, *New York State Association of Realtors, Inc.* v. *Shaffer:* When the Second Circuit Chooses Between Free Speech and Fair Housing, Who Wins?, 61 Brooklyn L. Rev. 397, 409–410, and nn. 71, 73, 418 (1995); Note, *Dunagin* v. *City of Oxford*: Mississippi's Suppression of Liquor Advertising, 63 Detroit L. Rev. 175, 184–187 (1985); Faille, Spinning the Roulette Wheel: Commercial Speech and Philosophical Cogency, Fed. B. N. & J. 58, 60–62 (1994); Margulies, Connecticut's Free Speech Clauses: A Framework and an Agenda, 65 Conn. Bar J. 437, 440, n. 20 (1991) (citing cases).

[9] The third prong of *Central Hudson* is far from a mechanical one. In *Posadas*, *Edge*, and other cases, the Court has presumed that advertising bans decrease consumption. Here, by contrast, the principal opinion demands *proof* of a "significant" decrease in consumption, and finds it lacking. But petitioners' own expert testified at one point that, taking into account disposable income, price was a "potent" influence on alcohol consumption, see App. 79; and the American Medical Association had apparently concluded that advertising of alcohol in general increased total alcohol consumption sufficiently to make a ban on advertising worthwhile, see *44 Liquor Mart, Inc.* v. *Racine*, 829 F. Supp. 543, 548 (RI 1993). A court more inclined to uphold the ban here could have pointed to these facts in support.

The courts have also had difficulty applying the fourth prong because the outcome has depended upon the level of generality with which the interest was described. See Faille, *supra*, at 58, 60. If today's strict application of the fourth prong survives, it will clarify the prong's application in a large number of cases, since, as noted above, it will simply invalidate most restrictions in which the government attempts to manipulate consumption through enforced ignorance rather than through direct regulation.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE SOUTER, and JUSTICE BREYER join, concurring in the judgment.

Rhode Island prohibits advertisement of the retail price of alcoholic beverages, except at the place of sale. The State's only asserted justification for this ban is that it promotes temperance by increasing the cost of alcoholic beverages. Brief for Respondent State of Rhode Island 22. I agree with the Court that Rhode Island's price-advertising ban is invalid. I would resolve this case more narrowly, however, by applying our established *Central Hudson* test to determine whether this commercial speech regulation survives First Amendment scrutiny.

Under that test, we first determine whether the speech at issue concerns lawful activity and is not misleading, and whether the asserted governmental interest is substantial. If both these conditions are met, we must decide whether the regulation "directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson Gas & Elec.*

---

[10] See *ante,* at 514 (noting that scope of any "vice" category of products would be difficult to define).

Corp. v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566 (1980).

Given the means by which this regulation purportedly serves the State's interest, our conclusion is plain: Rhode Island's regulation fails First Amendment scrutiny.

Both parties agree that the first two prongs of the *Central Hudson* test are met. Even if we assume, *arguendo*, that Rhode Island's regulation also satisfies the requirement that it directly advance the governmental interest, Rhode Island's regulation fails the final prong; that is, its ban is more extensive than necessary to serve the State's interest.

As we have explained, in order for a speech restriction to pass muster under the final prong, there must be a fit between the legislature's goal and method, "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480 (1989) (internal quotation marks omitted). While the State need not employ the least restrictive means to accomplish its goal, the fit between means and ends must be "narrowly tailored." *Ibid.* The scope of the restriction on speech must be reasonably, though it need not be perfectly, targeted to address the harm intended to be regulated. See *Florida Bar* v. *Went For It, Inc.*, 515 U. S. 618, 632–634 (1995). The State's regulation must indicate a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 417 (1993) (internal quotation marks omitted). The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny. See *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 486–487 (1995); *Cincinnati*, *supra*, at 417, n. 13. If alternative channels permit communication of the restricted speech, the regulation is more likely to be considered reasonable. See *Florida Bar, supra,* at 632–634.

Rhode Island offers one, and only one, justification for its ban on price advertising. Rhode Island says that the ban is intended to keep alcohol prices high as a way to keep consumption low. By preventing sellers from informing customers of prices, the regulation prevents competition from driving prices down and requires consumers to spend more time to find the best price for alcohol. Brief for Respondent State of Rhode Island 22. The higher cost of obtaining alcohol, Rhode Island argues, will lead to reduced consumption.

The fit between Rhode Island's method and this particular goal is not reasonable. If the target is simply higher prices generally to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it. The State has other methods at its disposal—methods that would more directly accomplish this stated goal without intruding on sellers' ability to provide truthful, nonmisleading information to customers. Indeed, Rhode Island's own expert conceded that "'the objective of lowering consumption of alcohol by banning price advertising could be accomplished by establishing minimum prices and/or by increasing sales taxes on alcoholic beverages.'" 39 F. 3d 5, 7 (CA1 1994). A tax, for example, is not normally very difficult to administer and would have a far more certain and direct effect on prices, without any restriction on speech. The principal opinion suggests further alternatives, such as limiting per capita purchases or conducting an educational campaign about the dangers of alcohol consumption. *Ante,* at 507. The ready availability of such alternatives—at least some of which would far more effectively achieve Rhode Island's only professed goal, at comparatively small additional administrative cost—demonstrates that the fit between ends and means is not narrowly tailored. Too, this regulation prevents sellers of alcohol from communicating price information anywhere but at the point of purchase. No channels exist at all to permit them to publicize the price of their products.

Respondents point for support to *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328 (1986), where, applying the *Central Hudson* test, we upheld the constitutionality of a Puerto Rico law that prohibited the advertising of casino gambling aimed at residents of Puerto Rico, but permitted such advertising aimed at tourists.

The Court there accepted as reasonable the legislature's belief that the regulation would be effective, and concluded that, because the restriction affected only advertising of casino gambling aimed at residents of Puerto Rico, not that aimed at tourists, the restriction was narrowly tailored to serve Puerto Rico's interest. 478 U. S., at 341–344. The Court accepted without question Puerto Rico's account of the effectiveness and reasonableness of its speech restriction. Respondents ask us to make a similar presumption here to uphold the validity of Rhode Island's law.

It is true that *Posadas* accepted as reasonable, without further inquiry, Puerto Rico's assertions that the regulations furthered the government's interest and were no more extensive than necessary to serve that interest. Since *Posadas,* however, this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny. See, *e. g., Florida Bar* v. *Went For It, Inc., supra; Rubin* v. *Coors Brewing Co., supra; Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U. S. 136 (1994); *Edenfield* v. *Fane*, 507 U. S. 761 (1993); *Cincinnati* v. *Discovery Network, Inc., supra.* In each of these cases we declined to accept at face value the proffered justification for the State's regulation, but examined carefully the relationship between the asserted goal and the speech restriction used to reach that goal. The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson,* by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored. Under such a closer look, Rhode Island's price-advertising ban clearly fails to pass muster.

Because Rhode Island's regulation fails even the less stringent standard set out in *Central Hudson,* nothing here requires adoption of a new analysis for the evaluation of commercial speech regulation. The principal opinion acknowledges that "even under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a reasonable fit between its abridgment of speech and its temperance goal." *Ante,* at 507 (internal quotation marks omitted). Because we need go no further, I would not here undertake the question whether the test we have employed since *Central Hudson* should be displaced.

Respondents argue that an additional factor, the Twenty-first Amendment, tips the First Amendment analysis in Rhode Island's favor.

The Twenty-first Amendment repealed the prohibition on the manufacture, sale, or transportation of intoxicating liquors that had been established by the Eighteenth Amendment. Section 2 of the Twenty-first Amendment created an exception to the normal operation of the Commerce Clause, to permit States to prohibit commerce in, or the use of, alcoholic beverages. *Craig* v. *Boren,* 429 U. S. 190, 206 (1976).

In its examination of Rhode Island's statute, the Court of Appeals erroneously concluded that the Twenty-first Amendment provided an "added presumption in favor of the validity of the state regulation." 39 F. 3d, at 7–9 (internal quotation marks omitted). The Twenty-first Amendment cannot save an otherwise invalid restriction on speech.

Nothing in the Amendment's text or history justifies its use to alter the application of the First Amendment. "[O]ur prior cases have made clear that the [Twenty-first] Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc.* v. *Crisp,* 467 U. S. 691, 712 (1984). See also *Larkin* v. *Grendel's Den, Inc.,* 459 U. S. 116, 122, n. 5 (1982) ("The State may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment"); *Craig, supra,* at 206 ("Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned" (internal quotation marks omitted)). The Twenty-first Amendment does not trump First Amendment rights or add a presumption of validity to a regulation that cannot otherwise satisfy First Amendment requirements.

The Court of Appeals relied on *California* v. *LaRue,* 409 U. S. 109, 118–119 (1972), for its determination that the Twenty-first Amendment provided an "added presumption" of the regulation's validity. There, this Court upheld a State's regulations prohibiting establishments licensed to sell liquor by the drink from offering explicitly sexual entertainment. As we recently explained in *Coors,* "*LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." 514 U. S., at 483, n. 2. The cases following *LaRue* similarly involved the regulation of nude or nearly nude dancing in establishments licensed to serve alcohol. *New York State Liquor Authority* v. *Bellanca,* 452 U. S. 714 (1981) *(per curiam); Newport* v. *Iacobucci,* 479 U. S. 92 (1986) *(per curiam).* Nothing in *LaRue* suggested that the Twenty-first Amendment would permit a State to prohibit the kind of speech at issue here, and as discussed above, the text and history of the Twenty-first Amendment clearly indicate that the Amendment was *not* intended to supplant the general application of constitutional provisions, except for its limited exception to the Commerce Clause's normal operation. Indeed, *LaRue* notes that prior decisions "did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations," 409 U. S., at 115, and *LaRue* certainly does not stand for that proposition. The Court of Appeals' reliance on *LaRue* was misplaced.

Rhode Island's prohibition on alcohol-price advertising, as a means to keep alcohol prices high and consumption low, cannot survive First Amendment scrutiny. The Twenty-first Amendment cannot save this otherwise invalid regulation. While I agree with the Court's finding that the regulation is invalid, I would decide that issue on narrower grounds. I therefore concur in the judgment.

UNITED STATES *v.* NOLAND, TRUSTEE FOR DEBTOR FIRST TRUCK LINES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 95–323. Argued March 25, 1996—Decided May 13, 1996

The Internal Revenue Service filed claims in the Bankruptcy Court for taxes, interest, and penalties that accrued after debtor First Truck Lines, Inc., sought relief under Chapter 11 of the Bankruptcy Code (Code) but before the case was converted to a Chapter 7 bankruptcy. The court found that all of the IRS's claims were entitled to first priority as administrative expenses under 11 U. S. C. §§ 503(b)(1)(C) and 507(a)(1), but held that the penalty claim was subject to "equitable subordination" under § 510(c), which the court interpreted as giving it authority not only to deal with inequitable Government conduct, but also to adjust a statutory priority of a category of claims. The court's decision to subordinate the penalty claim to the claims of the general unsecured creditors was affirmed by the District Court and the Sixth Circuit, which concluded that postpetition, nonpecuniary loss tax penalty claims are susceptible to subordination by their very nature.

Held: A bankruptcy court may not equitably subordinate claims on a categorical basis in derogation of Congress's priorities scheme. The language of § 510(c), principles of statutory construction, and legislative history clearly indicate Congress's intent in its 1978 revision of the Code to use the existing judge-made doctrine of equitable subordination as the starting point for deciding when subordination is appropriate. By adopting "principles of equitable subordination," § 510(c) allows a bankruptcy court to reorder a tax penalty when justified by particular facts. It is also clear that Congress meant to give courts some leeway to develop the doctrine. However, a reading of the statute that would give courts leeway broad enough to allow subordination at odds with the congressional ordering of priorities by category is improbable in the extreme. The statute would then empower a court to modify the priority provision's operation at the same level at which Congress operated when it made its characteristically general judgment to establish the hierarchy of claims in the first place, thus delegating legislative revision, not authorizing equitable exception. Nonetheless, just such a legislative type of decision underlies the reordering of priorities here. The Sixth Circuit's decision runs directly counter to Congress's policy judgment that a postpetition tax penalty should receive the priority of an administrative expense. Since the Sixth Circuit's rationale was inappropriately categorical in nature, this Court need not decide whether a bankruptcy court must always find creditor misconduct before a claim may be equitably subordinated. Pp. 538–543.

48 F. 3d 210, reversed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

Kent L. Jones argued the cause for the United States. With him on the briefs were *Solicitor General Days, Assistant Attorney General Argrett, Deputy Solicitor General Wallace, Gary D. Gray,* and *Edward T. Perelmuter.*

Raymond J. Pikna, Jr., argued the cause for respondent. With him on the brief were *Thomas R. Noland* and *Gregory P. Garner.*

JUSTICE SOUTER delivered the opinion of the Court.

The issue in this case is the scope of a bankruptcy court's power of equitable subordination under 11 U. S. C. § 510(c). Here, in the absence of any finding of inequitable conduct on the part of the Government, the Bankruptcy Court subordinated the Government's claim for a postpetition, noncompensatory tax penalty, which would normally receive first priority in bankruptcy as an "administrative expense," §§ 503(b)(1)(C), 507(a)(1). We hold that the bankruptcy court may not equitably subordinate claims on a categorical basis in derogation of Congress's scheme of priorities.

In April 1986, First Truck Lines, Inc., voluntarily filed for relief under Chapter 11 of the Bankruptcy Code, and in the subsequent operation of its business as a debtor-in-possession incurred, but failed to discharge, tax liabilities to the Internal Revenue Service (IRS). First Truck moved to convert the case to a Chapter 7 liquidation in June 1988, and in August 1988 the Bankruptcy Court granted that motion and appointed respondent Thomas R. Noland as trustee. The liquidation of the estate's assets raised insufficient funds to pay all of the creditors.

After the conversion, the IRS filed claims for taxes, interest, and penalties that accrued after the Chapter 11 filing but before the Chapter 7 conversion, and although the parties agreed that the claims for taxes and interest were entitled to priority as administrative expenses, §§503(b), 507(a)(1), and 726(a)(1),[1] they disagreed about the priority to be given tax penalties. The Bankruptcy Court determined that the penalties (like the taxes and interest) were administrative expenses under §503(b) but held them to be subject to equitable subordination under §510(c).[2] In so doing, the court read that section to provide authority not only to deal with inequitable conduct on the Government's part, but also to adjust a statutory priority of a category of claims. The Bankruptcy Court accordingly weighed the relative equities that seemed to flow from what it described as "the Code's preference for compensating actual loss claims," and subordinated the tax penalty claim to those of the general unsecured creditors. *In re First Truck Lines, Inc.*, 141 B. R. 621, 629 (SD Ohio 1992). The District Court affirmed. *Internal Revenue Service* v. *Noland,* 190 B. R. 827 (SD Ohio 1993).

After reviewing the legislative history of the 1978 revision to the Bankruptcy Code and several recent appeals cases on equitable subordination of tax penalties, the Sixth Circuit affirmed, as well. *In re First Truck Lines, Inc.*, 48 F. 3d 210 (1995). The Sixth Circuit stated that it did

---

[1] Section 507(a)(1) provides, in relevant part: "(a) The following expenses and claims have priority in the following order: (1) First, administrative expenses allowed under section 503(b) of this title . . . ." Under §503(b)(1), administrative expenses include "any tax . . . incurred by the estate" (with certain exceptions not relevant here), as well as "any fine [or] penalty . . . relating to [such] a tax . . . ." Section 726(a)(1) adopts the order of payment specified in §507 for Chapter 7 proceedings.

[2] Section 510(c) provides that "the court may . . . under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim . . . ."

> "not see the fairness or the justice in permitting the Commissioner's claim for tax penalties, which are not being assessed because of pecuniary losses to the Internal Revenue Service, to enjoy an equal or higher priority with claims based on the extension of value to the debtor, whether secured or not. Further, assessing tax penalties against the estate of a debtor no longer in existence serves no punitive purpose. Because of the nature of postpetition, nonpecuniary loss tax penalty claims in a Chapter 7 case, we believe such claims are susceptible to subordination. To hold otherwise would be to allow creditors who have supported the business during its attempt to reorganize to be penalized once that effort has failed and there is not enough to go around." *Id.*, at 218.

See also *Burden* v. *United States,* 917 F. 2d 115, 120 (CA3 1990); *Schultz Broadway Inn* v. *United States,* 912 F. 2d 230, 234 (CA8 1990); *In re Virtual Network Services Corp.*, 902 F. 2d 1246, 1250 (CA7 1990). We granted certiorari to determine the appropriate scope of the power under the Bankruptcy Code (Code) to subordinate a tax penalty, 516 U. S. 1005 (1995), and we now reverse.

The judge-made doctrine of equitable subordination predates Congress's revision of the Code in 1978. Relying in part on our earlier cases, see, *e. g., Comstock* v. *Group of Institutional Investors,* 335 U. S. 211 (1948); *Pepper* v. *Litton,* 308 U. S. 295 (1939); *Taylor* v. *Standard Gas & Elec. Co.,* 306 U. S. 307 (1939), the Fifth Circuit, in its influential opinion in *In re Mobile Steel Co.,* 563 F. 2d 692, 700 (1977), observed that the application of the doctrine was generally triggered by a showing that the creditor had engaged in "some type of inequitable conduct." *Mobile Steel* discussed two further conditions relating to the application of the doctrine: that the misconduct have "resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant," and that the subordination "not be inconsistent with the provisions of the Bankruptcy Act." *Ibid.* This last requirement has been read as a "reminder to the bankruptcy court that although it is a court of equity, it is not free to adjust the legally valid claim of an innocent party who asserts the claim in good faith merely because the court perceives that the result is inequitable." DeNatale & Abram, The Doctrine of Equitable Subordination as Applied to Nonmanagement Creditors, 40 Bus. Law. 417, 428 (1985). The District Courts and Courts of Appeals have generally followed the *Mobile Steel* formulation, *In re Baker & Getty Financial Services, Inc.*, 974 F. 2d 712, 717 (CA6 1992).

Although Congress included no explicit criteria for equitable subordination when it enacted § 510(c)(1), the reference in § 510(c) to "principles of equitable subordination" clearly indicates congressional intent at least to start with existing doctrine. This conclusion is confirmed both by principles of statutory construction, see *Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications") (citation omitted), and by statements in the legislative history that Congress "intended that the term 'principles of equitable subordination' follow existing case law and leave to the courts development of this principle," 124 Cong. Rec. 32398 (1978) (Rep. Edwards); see also *id.*, at 33998 (Sen. DeConcini). In keeping with pre-1978 doctrine, many Courts of Appeals have continued to require inequitable conduct before allowing the equitable subordination of most claims, see, *e. g.*, *In re Fabricators, Inc.*, 926 F. 2d 1458, 1464 (CA5 1991); *In re Bellanca Aircraft Corp.*, 850 F. 2d 1275, 1282–1283 (CA8 1988), although several have done away with the requirement when the claim in question was a tax penalty.

See, *e. g., Burden, supra,* at 120; *Schultz, supra,* at 234; *In re Virtual Network, supra,* at 1250.

Section 510(c) may of course be applied to subordinate a tax penalty, since the Code's requirement that a Chapter 7 trustee must distribute assets "in the order specified in . . . section 507" (which gives a first priority to administrative expense tax penalties) is subject to the qualification, "[e]xcept as provided in section 510 of this title . . . ." 11 U. S. C. § 726(a). Thus, "principles of equitable subordination" may allow a bankruptcy court to reorder a tax penalty in a given case. It is almost as clear that Congress meant to give courts some leeway to develop the doctrine, 124 Cong. Rec. 33998 (1978), rather than to freeze the pre-1978 law in place. The question is whether that leeway is broad enough to allow subordination at odds with the congressional ordering of priorities by category.

The answer turns on Congress's probable intent to preserve the distinction between the relative levels of generality at which trial courts and legislatures respectively function in the normal course. Hence, the adoption in § 510(c) of "principles of equitable subordination" permits a court to make exceptions to a general rule when justified by particular facts, cf. *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case"). But if the provision also authorized a court to conclude on a general, categorical level that tax penalties should not be treated as administrative expenses to be paid first, it would empower a court to modify the operation of the priority statute at the same level at which Congress operated when it made its characteristically general judgment to establish the hierarchy of claims in the first place. That is, the distinction between characteristic legislative and trial court functions would simply be swept away, and the statute would delegate legislative revision, not authorize equitable exception. We find such a reading improbable in the extreme. "Decisions about the treatment of categories of claims in bankruptcy proceedings . . . are not dictated or illuminated by principles of equity and do not fall within the judicial power of equitable subordination . . . ." *Burden,* 917 F. 2d, at 122 (Alito, J., concurring in part and dissenting in part).

Just such a legislative type of decision, however, underlies the Bankruptcy Court's reordering of priorities in question here, as approved by the District Court and the Court of Appeals. Despite language in its opinion about requiring a balancing of the equities in individual cases, the Court of Appeals actually concluded that "postpetition, nonpecuniary loss tax penalty claims" are "susceptible to subordination" by their very "nature." 48 F. 3d, at 218. And although the court said that not every tax penalty would be equitably subordinated, *ibid.,* that would be the inevitable result of consistent applications of the rule employed here, which depends not on individual equities but on the supposedly general unfairness of satisfying "postpetition, nonpecuniary loss tax penalty claims" before the claims of a general creditor.

The Court of Appeals's decision thus runs directly counter to Congress's policy judgment that a postpetition tax penalty should receive the priority of an administrative expense, 11 U. S. C. §§ 503(b)(1)(C), 507(a)(1), and 726(a)(1). This is true regardless of Noland's argument that the Bankruptcy Court made a distinction between compensatory and noncompensatory tax penalties, for this was itself a categorical distinction at a legislative level of generality. Indeed, Congress recognized and employed that distinction elsewhere in the priority provisions: Congress specifically assigned 8th priority to certain compensatory tax penalties, see § 507(a)(8)(G), and 12th priority to prepetition, noncompensatory penalties, see §§ 726(a)(1) and (4).[3]

---

[3] Noland argues that "although the penalties at issue arose postpetition," this claim should be viewed as a prepetition penalty because a "reorganized debtor is in many respects similar to a prepetition debtor . . . [and]

The Sixth Circuit, to be sure, invoked a more modest authority than legislative revision when it relied on statements by the congressional leaders of the 1978 Code revisions, see 48 F. 3d, at 215, 217–218, and it is true that Representative Edwards and Senator DeConcini stated that "under existing law, a claim is generally subordinated only if [the] holder of such claim is guilty of inequitable conduct, or the claim itself is of a status susceptible to subordination, such as a penalty or a claim for damages arising from the purchase or sale of a security of the debtor." 124 Cong. Rec. 32398 (1978) (Rep. Edwards); see also *id.*, at 33998 (Sen. DeConcini). But their remarks were not statements of existing law and the Sixth Circuit's reliance on the unexplained reference to subordinated penalties ran counter to this Court's previous endorsement of priority treatment for postpetition tax penalties. See *Nicholas* v. *United States*, 384 U. S. 678, 692–695 (1966). More fundamentally, statements in legislative history cannot be read to convert statutory leeway for judicial development of a rule on particularized exceptions into delegated authority to revise statutory categorization, untethered to any obligation to preserve the coherence of substantive congressional judgments.

---

the conversion of [this] case to chapter 7 was tantamount to the filing of a new petition." Brief for Respondent 16, n. 7. But we agree with the Sixth Circuit, see *In re First Truck Lines, Inc.*, 48 F. 3d 210, 214 (1995), that the penalties at issue here are postpetition administrative expenses pursuant to 11 U. S. C. §§348(d), 503(b)(1). Although §348(d) provides that a "claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1208, or 1307 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition," the claim for priority here is "specified in section 503(b)" and Congress has already determined that it is not to be treated like prepetition penalties. Noland may or may not have a valid policy argument, but it is up to Congress, not this Court, to revise the determination if it so chooses.

Given our conclusion that the Sixth Circuit's rationale was inappropriately categorical in nature, we need not decide today whether a bankruptcy court must always find creditor misconduct before a claim may be equitably subordinated. We do hold that (in the absence of a need to reconcile conflicting congressional choices) the circumstances that prompt a court to order equitable subordination must not occur at the level of policy choice at which Congress itself operated in drafting the Code. Cf. *In re Ahlswede,* 516 F. 2d 784, 787 (CA9) ("[T]he [equity] chancellor never did, and does not now, exercise unrestricted power to contradict statutory or common law when he feels a fairer result may be obtained by application of a different rule"), cert. denied *sub nom. Stebbins* v. *Crocker Citizens Nat. Bank,* 423 U. S. 913 (1975); *In re Columbia Ribbon Co.,* 117 F. 2d 999, 1002 (CA3 1941) (court cannot "set up a subclassification of claims . . . and fix an order of priority for the sub-classes according to its theory of equity").

In this instance, Congress could have, but did not, deny noncompensatory, postpetition tax penalties the first priority given to other administrative expenses, and bankruptcy courts may not take it upon themselves to make that categorical determination under the guise of equitable subordination. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751 *v.* BROWN GROUP, INC., DBA BROWN SHOE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95–340. Argued February 20, 1996—Decided May 13, 1996

Petitioner union filed this suit, alleging that respondent company began to lay off workers in connection with the closing of one of its plants before giving the union the closing notice required by the Worker Adjustment and Retraining Notification Act (WARN Act), and seeking backpay for each of its affected members. The District Court dismissed the complaint, and the Court of Appeals affirmed, holding that the suit was barred because the union failed to meet the third part of the test for determining associational standing.

Held:

1. The WARN Act grants a union authority to sue for damages on behalf of its members, *North Star Steel Co.* v. *Thomas,* 515 U. S. 29, 31; the writ of certiorari therefore was not improvidently granted. Pp. 548–550.

2. The union has standing to bring this action. Pp. 551–558.

(a) Under modern associational standing doctrine, an organization may sue to redress its members' injuries when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Washington State Apple Advertising Comm'n,* 432 U. S. 333, 343. The requirement of individual participation has been understood to preclude associational standing when an organization seeks damages on behalf of its members. The question here is whether a bar to the union's suit found in this third prong of the test is constitutional and absolute, or prudential and malleable by Congress. The Court of Appeals apparently concluded that the test's third prong is of constitutional character, for it denied standing even though the WARN Act permits the union to sue for its members' damages. Pp. 551–554.

(b) The test's first prong is grounded in Article III as an element of the constitutional case or controversy requirement. Resort to general principles, however, leads to the conclusion that the third prong is a prudential impediment that Congress may abrogate. *Hunt*'s requirement that an organization suing as representative include at least one member with standing to present, in his or her own right, the claim pleaded by the association is an Article III necessity for the association's representative suit. *Hunt*'s second prong is complementary to the first, because it raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary. But once an association has satisfied *Hunt*'s first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more. The third prong is best seen as focusing on matters of administrative convenience and efficiency, not on elements of a case or controversy. Circumstantial evidence of that prong's prudential nature is seen in the wide variety of other contexts in which a statute, federal rule, or accepted common-law practice permits one person to sue on behalf of another, even where damages are sought. See, *e. g.*, 42 U. S. C. § 2000e–5(f)(1). Pp. 554–558.

50 F. 3d 1426, reversed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

Laurence Gold argued the cause for petitioner. With him on the briefs were *George Murphy, Renee L. Bowser, Marsha S. Berzon,* and *Jonathan P. Hiatt.*

Alan Jenkins argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days, Deputy Solicitor General Kneedler, Thomas S. Williamson, Jr., Allen H. Feldman, Nathaniel I. Spiller,* and *Mark S. Flynn.*

Thomas C. Walsh argued the cause for respondent. With him on the brief were *Michael G. Biggers, James N. Foster, Jr., Michelle M. Cain,* and *Robert D. Pickle.**

JUSTICE SOUTER delivered the opinion of the Court.

The Worker Adjustment and Retraining Notification Act (WARN Act or Act), 102 Stat. 890, 29 U. S. C. § 2101 *et seq.*, obligates certain employers to give workers or their union

---

**Kary L. Moss* filed a brief for the American Federation of Government Employees et al. as *amici curiae* urging reversal.

60 days' notice before a plant closing or mass layoff. If an employer fails to give the notice, the employees may sue for backpay for each day of the violation, and, in the alternative, the union is ostensibly authorized to sue on their behalf. See *North Star Steel Co.* v. *Thomas,* 515 U. S. 29 (1995); Part II, *infra.*

Permitting a union to sue under the Act on behalf of its employee-members raises a question of standing. In *Hunt* v. *Washington State Apple Advertising Comm'n,* 432 U. S. 333 (1977), we described a three-prong test for an association's standing to sue based on injury to one of its members. The third element, at issue here, would bar such a suit when "the claim asserted [or] the relief requested requires the participation of individual members in the lawsuit." *Id.,* at 343. Relying on *Warth* v. *Seldin,* 422 U. S. 490 (1975), *Hunt* held that "individual participation" is not normally necessary when an association seeks prospective or injunctive relief for its members, but indicated that such participation would be required in an action for damages to an association's members, thus suggesting that an association's action for damages running solely to its members would be barred for want of the association's standing to sue. See *Hunt, supra,* at 343.

The questions presented here are whether, in enacting the WARN Act, Congress intended to abrogate this otherwise applicable standing limitation so as to permit the union to sue for damages running to its workers, and, if it did, whether it had the constitutional authority to do so. We answer yes to each question.

I

On January 17, 1992, respondent Brown Shoe Company wrote to a representative of the United Food and Commercial Workers International Union, stating that Brown Shoe would shut down its Dixon, Missouri, plant and permanently lay off 277 employees beginning on March 20, 1992. App. 62–63. The complaint filed by petitioner United Food and

Commercial Workers Union Local 751 charged that Brown Shoe's representations were false insofar as they are relevant here, and that in fact, even before sending the letter, Brown Shoe had begun the layoffs, which continued through February and into March. App. 8–9.[1] The union accordingly claimed a violation of the WARN Act and sought the statutory remedy of 60-days' backpay for each of its affected members.

The District Court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6), saying that "when an organization seeks to recover monetary relief on behalf of its members, courts have found that such claims necessarily require participation of individual members in the suit." 820 F. Supp. 1192, 1193–1194 (ED Mo. 1993). The Court of Appeals for the Eighth Circuit affirmed, concluding that "[e]ach union member who wishes to recover WARN Act damages from Brown Shoe must participate in the suit so that his or her right to damages can be determined and the quantum of damages can be calculated by the court on the basis of particularized proof. Therefore, the union cannot meet the third part of the *Hunt* test and is precluded from asserting associational standing." 50 F. 3d 1426, 1432 (1995).[2] We granted certiorari, 516 U. S. 930 (1995), and now reverse.

---

[1] Because the District Court dismissed the complaint, for the purposes of deciding this appeal we assume the truth of this allegation. Nor do we reach the merits of, or any other issue about, the union's further complaint that Brown Shoe's letter was defective because it was sent to an individual who worked for the International. The complaint alleges that United Food Local 751, not the International or its employee, is the exclusive representative of the affected employees and is thus statutorily entitled to notice of the closing and mass layoff.

[2] The District Court had also denied the union's motion to amend its complaint to add employees as plaintiffs. App. to Pet. for Cert. 18a–19a. The Court of Appeals held that the District Court's decision in this respect did not represent an abuse of its discretion. 50 F. 3d, at 1432. The correctness of this determination is outside the scope of the questions presented here. See Pet. for Cert. i.

II

At the outset, Brown Shoe argues that the WARN Act grants a union no authority to sue for damages on behalf of its members. Because the question on which we granted certiorari (whether Congress has the constitutional authority to alter the third prong of the associational standing enquiry) assumes that the WARN Act does grant the union such authority, Brown Shoe urges us to declare the writ of certiorari improvidently granted. In *North Star Steel*, however, we noted, contrary to Brown Shoe's position, that "[t]he class of plaintiffs" who may sue for backpay under the WARN Act "includes aggrieved employees (or their unions, as representatives)." 515 U. S., at 31, and on further consideration we have no doubt that we were reading the statute correctly.

The key requirement of the Act is found in § 2102, which prohibits an employer from ordering "a plant closing or mass layoff until the end of a 60-day period" running from the date of the employer's written notice of the closing or layoff "(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee," and "(2) to the State dislocated worker unit . . . and the chief elected official of the unit of local government within which such closing or layoff is to occur." 29 U. S. C. § 2102(a). Congress defined the "representative" to which § 2102(a)(1) refers as the employees' union, "an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act (29 U. S. C. 159(a), 158(f)) or section 2 of the Railway Labor Act (45 U. S. C. 152)." 102 Stat. 890, 29 U. S. C. § 2101(a)(4).

Enforcement of the § 2102 notice requirement is addressed in § 2104(a), the following provisions of which answer Brown Shoe's argument. Section 2104(a)(1) makes a violating employer liable to "each aggrieved employee" for backpay and benefits for each day of the violation.[3] Section 2104(a)(5) provides that "[a] person seeking to enforce such liability, including a representative of employees . . . aggrieved under paragraph (1) . . . , may sue either for such person or for other persons similarly situated, or both, [in an appropriate district court]."

Since the union is the "representative of employees . . . aggrieved," it is a person who may sue on behalf of the "persons similarly situated" in order to "enforce such liability." "[S]uch liability" must refer to liability under § 2104, since its remedies are exclusive. See 29 U. S. C. § 2104(b). Because the section makes no provision for liability to the union itself, any "such liability" sought by the union must (so far as concerns us here) be liability to its employee-members, so long as they can be understood to be "persons similarly situated" for the purposes of the Act. We believe they may be so understood, since each is aggrieved by the employer's failure to give timely notice.

Brown Shoe's alternative construction is unconvincing. It contends that a previous bill would have imposed civil liability on employers who failed to notify the union of a plant closing or mass layoff, and would have permitted the union to sue to recover a penalty where an employer failed to provide the required notice. See S. 538, 100th Cong., 1st Sess. (1987). In the ultimately enacted version of the legislation, Congress eliminated this provision, with the result that the WARN Act no longer speaks to the "rights and welfare of unions," Brief for Respondent 12. Brown Shoe's argument is that the class of persons "similarly situated" is the class entitled to sue for damages, so that the elimination of the union's entitlement to a civil penalty requires the conclusion that the union is no longer "similarly situated" to "employees . . . aggrieved under paragraph (1)," and thus not permitted to sue under the Act.

---

[3] 102 Stat. 893, as set forth in 29 U. S. C. § 2104(a)(1):

"Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—

"(A) back pay for each day of violation at a rate of compensation not less than the higher of—

"(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

"(ii) the final regular rate received by such employee; and

"(B) benefits under an employee benefit plan . . . , including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

"Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer."

The flaw in this argument is that it would force us to conclude that the provision for suits by unions is attributable only to congressional inadvertence, whereas inadvertence is not the only possible, or even plausible, explanation for the authorization. For one, the statutory reference to persons "similarly situated" can very readily be understood to mean the class of persons to whom notice is owed but not given. In this respect, the union and its members are certainly persons "similarly situated." Brown Shoe's argument also fails to explain why Congress would necessarily have intended to eliminate the union's power to sue on behalf of members (as Brown Shoe assumes the union could have done prior to the amendment) just because the union was no longer entitled to a penalty in its own right. The argument for Brown Shoe's preferred construction simply rests on one speculative possibility in opposing a straightforward reading of the provision that a union may bring suit on behalf of its members, who are "employees . . . aggrieved under paragraph (1)." Speculation loses, for the more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight.

III

This brings us to the primary question in the case: whether the union has standing to bring this action on behalf of its members.[4] Article III of the Constitution limits the federal judicial power to "Cases" or "Controversies," thereby entailing as an "irreducible minimum" that there be (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. See, *e. g., Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville,* 508 U. S. 656, 663 (1993); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U. S. 464, 472 (1982). Supplementing these constitutional requirements, the prudential doctrine of standing has come to encompass "several judicially self-imposed limits on the exercise of federal jurisdiction." See *Allen* v. *Wright,* 468 U. S. 737, 751 (1984); see also *Flast* v. *Cohen,* 392 U. S. 83, 97 (1968). The question here is whether a bar to the union's suit found in the test for so-called associational standing is constitutional and absolute, or prudential and malleable by Congress.

A

The notion that an organization might have standing to assert its members' injury has roots in *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 459 (1958), where the Court noted that for the purpose of determining the scope of the

---

[4] The union also argues that it has standing because it suffered direct injury. The Court of Appeals held that the union lacked standing to assert its direct injury because neither backpay to the employees nor its "catch-all prayer for relief" would redress the union's injury. 50 F. 3d 1426, 1431, n. 7 (CA8 1995). The union argues here that its injury would be redressed because an award of damages to the employees would deter future violations and would facilitate the union's role in assisting its members. In light of our resolution of the associational standing question, we do not have occasion today to address this issue.

National Association for the Advancement of Colored People's (NAACP's) rights as a litigant, the association "and its members are in every practical sense identical." The Court accordingly permitted the NAACP to rely on violations of its members' First Amendment associational rights in suing to bar the State of Alabama from compelling disclosure of the association's membership lists. See also *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 183–187 (1951) (Jackson, J., concurring); *Barrows* v. *Jackson,* 346 U. S. 249, 255–259 (1953); *NAACP* v. *Button,* 371 U. S. 415, 428 (1963); *National Motor Freight Traffic Assn., Inc.* v. *United States,* 372 U. S. 246, 247 (1963); *Sierra Club* v. *Morton,* 405 U. S. 727, 739 (1972).

The modern doctrine of associational standing, under which an organization may sue to redress its members' injuries, even without a showing of injury to the association itself, emerges from a trilogy of cases. We first squarely recognized an organization's standing to bring such a suit in *Warth* v. *Seldin,* 422 U. S. 490 (1975).

> "The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . [S]o long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Id.,* at 511.

Warth's requirements for associational standing were elaborated in *Hunt.* There we held that the Washington State Apple Advertising Commission, a state agency whose statutory charge was to promote the State's apple industry, had standing to bring a dormant Commerce Clause challenge to a North Carolina statute forbidding the display of Washington

State apple grades on apple containers. Relying on *Warth,* the *Hunt* Court stated a three-prong associational standing test:

> "[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U. S., at 343.

Finally, in *Automobile Workers* v. *Brock,* 477 U. S. 274 (1986), we held that a union had standing to challenge an agency's construction of a statute providing benefits to workers who lost their jobs because of competition from imports. The union there did not allege any injury to itself, nor was it argued that the members' associational rights were affected. Reaffirming and applying the three-part test emerging from *Warth* and *Hunt,* we held that the union had standing to bring the suit. 477 U. S., at 281–288. See also *Pennell* v. *San Jose,* 485 U. S. 1, 7, and n. 3 (1988).

B

The Court of Appeals here concluded that the union's members would have had standing to sue on their own (the first prong), and recognized that the interests the union sought to protect were germane to its purpose (the second prong). But it denied the union's claim of standing because it found that the relief sought by the union, damages on behalf of its members, would require the participation of individual members in the lawsuit. 50 F. 3d, at 1431. It relied on the statement in *Warth* that "[i]f in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." 422 U. S., at 515. These and later precedents have been understood to preclude associational standing when an organization seeks damages on behalf of its members. See, *e. g., Telecommunications Research & Action Center* v. *Allnet Communication Services, Inc.*, 806 F. 2d 1093, 1094–1095 (CADC 1986) ("[L]ower federal courts have consistently rejected association assertions of standing to seek monetary, as distinguished from injunctive or declaratory, relief on behalf of the organization's members") (collecting cases).[5]

One court has suggested that this bar is of constitutional magnitude, see *National Assn. of Realtors* v. *National Real Estate Assn., Inc.*, 894 F. 2d 937, 941 (CA7 1990) ("[A]ssociations have been held to have standing under Article III of the Constitution to seek injunctive relief—but never damages"). The Court of Appeals here apparently agreed with that suggestion, and so dismissed for lack of union standing despite the WARN Act's provision permitting the union to sue. We therefore take up the question whether the third prong of the associational standing enquiry is of constitutional character.

C

Although *Warth* noted that the test's first requirement, that at least one of the organization's members would have standing to sue on his own, is grounded on Article III as an element of "the constitutional requirement of a case or controversy," *Warth, supra,* at 511, our cases have not otherwise clearly disentangled the constitutional from the prudential strands of the associational standing test. Cf. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U. S., at 471 ("[I]t has not always been clear in the opinions of this Court whether particular features of the 'standing' requirement have been required by Art. III *ex proprio vigore,* or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution"); June, The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power, 24 Envtl. L. 761, 793 (1994) (noting uncertainty "whether requirements such as [associational] standing are constitutional or prudential in nature"). Resort to general principles, however, leads us to say that the associational standing test's third prong is a prudential one.

---

[5] United Food argues that "given the simplified nature of the monetary relief here provided," Brief for Petitioner 44, n. 17, the third prong of the *Hunt* test is satisfied despite its claim for damages. In light of our conclusion that in the WARN Act Congress has abrogated the third prong of the associational standing test, we need not decide here whether, absent congressional action, the third prong would bar a "simplified" claim for damages.

There are two ways in which *Hunt* addresses the Article III requirements of injury in fact, causal connection to the defendant's conduct, and redressability. First and most obviously, it guarantees the satisfaction of these elements by requiring an organization suing as representative to include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association. As *Hunt*'s most direct address to Article III standing, this first prong can only be seen as itself an Article III necessity for an association's representative suit. Cf. *Simon* v. *Eastern Ky. Welfare Rights Organization,* 426 U. S. 26, 40 (1976) (the association "can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right"). Hunt's second prong is, at the least, complementary to the first, for its demand that an association plaintiff be organized for a purpose germane to the subject of its member's claim raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary.[6] But once an association has satisfied *Hunt*'s first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more. See generally *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). To see *Hunt*'s third prong as resting on less than constitutional necessity is not, of course, to rob it of its value. It may well promote adversarial intensity. It may guard against the hazard of litigating a case to the damages stage only to find the plaintiff lacking detailed records or the evidence necessary to show the harm with sufficient specificity. And it may hedge against any risk that the damages recovered by the association will fail to find their way into the pockets of the members on whose behalf injury is claimed. But these considerations are generally on point whenever one plaintiff sues for another's injury. And although we noted in *Flast* that "a litigant will ordinarily not be permitted to assert the rights of absent third parties," 392 U. S., at 99, n. 20; see also *Valley Forge, supra,* at 474, we recognized in *Allen* v. *Wright,* 468 U. S., at 751, that "the general prohibition on a litigant's raising another person's legal rights" is a "judicially self-imposed limi[t] on the exercise of federal jurisdiction," not a constitutional mandate. Indeed, the entire doctrine of "representational standing," of which the notion of "associational standing" is only one strand, rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition[7] or by statute[8]) are sufficient to rebut the background presumption (in the statutory context, about Congress's intent) that litigants may not assert the rights of absent third parties. Hence the third prong of the associational standing test is best seen as focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution.

---

[6] Because the union is statutorily entitled to receive notice under the WARN Act, and because of the paramount role, under federal labor law, that unions play in protecting the interests of their members, it is clear that this test is satisfied here. We therefore need not decide whether this prong is prudential in the sense that Congress may definitively declare that a particular relation is sufficient.

The germaneness of a suit to an association's purpose may, of course, satisfy a standing requirement without necessarily rendering the association's representation adequate to justify giving the association's suit preclusive effect as against an individual ostensibly represented. See generally *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797 (1985); *Matsushita Elec. Industrial Co.* v. *Epstein*, 516 U. S. 367, 395–399 (1996) (GINSBURG, J., concurring in part and dissenting in part). See also *Automobile Workers* v. *Brock*, 477 U. S. 274, 289 (1986) ("[A]n association might prove an inadequate representative of its members' legal interests for a number of reasons"); Note, Associational Standing and Due Process: The Need for an Adequate Representation Scrutiny, 61 B. U. L. Rev. 174 (1981). In this case, of course, no one disputes the adequacy of the union, selected by the employees following procedures governed by a detailed body of federal law and serving as the duly authorized collective-bargaining representative of the employees, as an associational representative. See generally *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575 (1969).

Circumstantial evidence of the prudential nature of this requirement is seen in the wide variety of other contexts in which a statute, federal rule, or accepted common-law practice permits one person to sue on behalf of another, even where damages are sought. "[R]epresentative damages litigation is common—from class actions under Fed. R. Civ. P. 23(b)(3) to suits by trustees representing hundreds of creditors in bankruptcy to *parens patriae* actions by state governments to litigation by and against executors of decedents' estates." *In re Oil Spill by the Amoco Cadiz off the Coast of France on Mar. 16, 1978,* 954 F. 2d 1279, 1319 (CA7 1992) *(per curiam).* In addition, § 706(f)(1) of Title VII of the

---

[7] See, *e. g., Whitmore* v. *Arkansas,* 495 U. S. 149 (1990) (recognizing a next-friend's standing).

[8] See, *e. g.,* Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.,* and the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.*

Civil Rights Act of 1964, 42 U. S. C. § 2000e–5(f)(1), expressly authorizes the Equal Employment Opportunity Commission to sue for backpay on behalf of employees who are victims of employment discrimination, *General Telephone Co. of Northwest* v. *EEOC,* 446 U. S. 318 (1980), and the Fair Labor Standards Act of 1938, 29 U. S. C. § 201 *et seq.,* contains a comparable provision permitting the Secretary of Labor to sue for the recovery of unpaid minimum wages and overtime compensation, 29 U. S. C. § 216(c). If these provisions for representative actions were generally resulting in nonadversarial actions that failed to resolve the claims of the individuals ultimately interested, their disservice to the core Article III requirements would be no secret. There is no reason to expect that union actions under the WARN Act portend any greater Article III incursions.

D

Because Congress authorized the union to sue for its members' damages, and because the only impediment to that suit is a general limitation, judicially fashioned and prudentially imposed, there is no question that Congress may abrogate the impediment. As we noted in *Warth,* prudential limitations are rules of "judicial self-governance" that "Congress may remove . . . by statute." 422 U. S., at 509. It has done so without doubt in this instance.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

BMW OF NORTH AMERICA, INC. *v.* GORE

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 94–896. Argued October 11, 1995—Decided May 20, 1996

After respondent Gore purchased a new BMW automobile from an authorized Alabama dealer, he discovered that the car had been repainted. He brought this suit for compensatory and punitive damages against petitioner, the American distributor of BMW's, alleging, *inter alia*, that the failure to disclose the repainting constituted fraud under Alabama law. At trial, BMW acknowledged that it followed a nationwide policy of not advising its dealers, and hence their customers, of predelivery damage to new cars when the cost of repair did not exceed 3 percent of the car's suggested retail price. Gore's vehicle fell into that category. The jury returned a verdict finding BMW liable for compensatory damages of $4,000, and assessing $4 million in punitive damages. The trial judge denied BMW's post-trial motion to set aside the punitive damages award, holding, among other things, that the award was not "grossly excessive" and thus did not violate the Due Process Clause of the Fourteenth Amendment. See, *e. g., TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 454. The Alabama Supreme Court agreed, but reduced the award to $2 million on the ground that, in computing the amount, the jury had improperly multiplied Gore's compensatory damages by the number of similar sales in all States, not just those in Alabama.

Held: The $2 million punitive damages award is grossly excessive and therefore exceeds the constitutional limit. Pp. 568–586.

(a) Because such an award violates due process only when it can fairly be categorized as "grossly excessive" in relation to the State's legitimate interests in punishing unlawful conduct and deterring its repetition, cf. *TXO*, 509 U. S., at 456, the federal excessiveness inquiry appropriately begins with an identification of the state interests that such an award is designed to serve. Principles of state sovereignty and comity forbid a State to enact policies for the entire Nation, or to impose its own policy choice on neighboring States. See, *e. g., Healy* v. *Beer Institute*, 491 U. S. 324, 335–336. Accordingly, the economic penalties that a State inflicts on those who transgress its laws, whether the penalties are legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and economy, rather than those of other States or the entire Nation. Gore's award must therefore be analyzed in the light of conduct that occurred solely within Alabama, with consideration being given only to the interests of Alabama consumers. Pp. 568–574.

(b) Elementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose, lead to the conclusion that the $2 million award is grossly excessive. Pp. 574–575.

(c) None of the aggravating factors associated with the first (and perhaps most important) indicium of a punitive damages award's excessiveness—the degree of reprehensibility of the defendant's conduct, see, *e. g., Day* v. *Woodworth,* 13 How. 363, 371—is present here. The harm BMW inflicted on Gore was purely economic; the presale repainting had no effect on the car's performance, safety features, or appearance; and BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. Gore's contention that BMW's nondisclosure was particularly reprehensible because it formed part of a nationwide pattern of tortious conduct is rejected, because a corporate executive could reasonably have interpreted the relevant state statutes as establishing safe harbors for nondisclosure of presumptively minor repairs, and because there is no evidence either that BMW acted in bad faith when it sought to establish the appropriate line between minor damage and damage requiring disclosure to purchasers, or that it persisted in its course of conduct after it had been adjudged unlawful. Finally, there is no evidence that BMW engaged in deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive. Pp. 575–580.

(d) The second (and perhaps most commonly cited) indicium of excessiveness—the ratio between the plaintiff's compensatory damages and the amount of the punitive damages, see, *e. g., TXO,* 509 U. S., at 459—also weighs against Gore, because his $2 million award is 500 times the amount of his actual harm as determined by the jury, and there is no suggestion that he or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy. Although it is not possible to draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case, see, *e. g., id.,* at 458, the ratio here is clearly outside the acceptable range. Pp. 580–583.

(e) Gore's punitive damages award is not saved by the third relevant indicium of excessiveness—the difference between it and the civil or criminal sanctions that could be imposed for comparable misconduct, see, *e. g., Pacific Mut. Life Ins. Co.* v. *Haslip,* 499 U. S. 1, 23—because

$2 million is substantially greater than Alabama's applicable $2,000 fine and the penalties imposed in other States for similar malfeasance, and because none of the pertinent statutes or interpretive decisions would have put an out-of-state distributor on notice that it might be subject to a multimillion dollar sanction. Moreover, in the absence of a BMW history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient. Pp. 583–585.

(f) Thus, BMW's conduct was not sufficiently egregious to justify the severe punitive sanction imposed against it. Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate Alabama consumers' economic interests is a matter for that court to address in the first instance. Pp. 585–586.

646 So. 2d 619, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which O'CONNOR and SOUTER, JJ., joined, *post*, p. 586. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 598. GINSBURG, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 607.

Andrew L. Frey argued the cause for petitioner. With him on the briefs were *Kenneth S. Geller*, *Evan M. Tager*, *Michael C. Quillen*, *Dennis J. Helfman*, and *David Cordero*.

Michael H. Gottesman argued the cause for respondent. With him on the brief were *Jonathan S. Massey*, *Andrew W. Bolt II*, *John W. Haley*, *Bruce J. McKee*, *Kenneth J. Chesebro*, and *Stephen K. Wollstein*.*

---

*Briefs of *amici curiae* urging reversal were filed for the American Automobile Manufacturers Association et al. by *Kenneth W. Starr*, *Paul T. Cappuccio*, *Christopher Landau*, *Richard A. Cordray*, and *Phillip D. Brady;* for the American Council of Life Insurance et al. by *Patricia A. Dunn*, *Stephen J. Goodman*, *Phillip E. Stano*, and *Theresa L. Sorota;* for the American Tort Reform Association et al. by *Victor E. Schwartz*, *Scott L. Winkelman*, *Sherman Joyce*, and *Fred J. Hiestand;* for the Business Council of Alabama by *Forrest S. Latta;* for the Center for Claims Resolution by *John D. Aldock* and *Frederick C. Schafrick;* for the Chamber of Commerce of the United States of America by *Timothy B. Dyk*, *Stephen A. Bokat*, and *Robin S. Conrad;* for the Farmers Insurance Exchange

JUSTICE STEVENS delivered the opinion of the Court.

The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a " 'grossly excessive' " punishment on a tortfeasor. *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 454 (1993) (and cases cited). The wrongdoing involved in this case was the decision by a national distributor of automobiles not to advise its dealers, and hence their customers, of predelivery damage to new cars when the cost of repair amounted to less than 3 percent of the car's suggested retail price. The question presented

---

et al. by *Irving H. Greines, Robin Meadow, Barbara W. Ravitz,* and *Robert A. Olson;* for the Life Insurance Company of Georgia et al. by *Theodore B. Olson, Larry L. Simms, Theodore J. Boutrous, Jr., John K. Bush, Theodore J. Fischkin,* and *Marcus Bergh;* for the National Association of Manufacturers by *Carter G. Phillips* and *Jan Amundson;* for the New England Council et al. by *Stephen S. Ostrach;* for Owens-Corning Fiberglas Corporation by *Charles Fried, Michael W. Schwartz,* and *Karen I. Ward;* for Owens-Illinois, Inc., by *Griffin B. Bell* and *David L. Gray;* for Pharmaceutical Research and Manufacturers of America by *Andrew T. Berry;* for the Product Liability Advisory Council, Inc., et al. by *Malcolm E. Wheeler;* for the TIG Insurance Company by *Ellis J. Horvitz, Barry R. Levy, Frederic D. Cohen,* and *Mitchell C. Tilner;* and for the Washington Legal Foundation et al. by *Arvin Maskin, Steven Alan Reiss, Katherine Oberlies, Daniel J. Popeo,* and *Paul D. Kamenar.*

Briefs of *amici curiae* urging affirmance were filed for the Alabama Trial Lawyers Association by *Russell J. Drake;* for the Association of Trial Lawyers of America by *Jeffrey Robert White, Cheryl Flax-Davidson,* and *Larry S. Stewart;* and for the National Association of Securities and Commercial Law Attorneys by *Kevin P. Roddy, James P. Solimano, Steve W. Berman,* and *Jonathan W. Cuneo.*

Briefs of *amici curiae* were filed for CBS, Inc., et al. by *P. Cameron DeVore, Marshall J. Nelson, Douglas P. Jacobs, Jonathan E. Thackeray, John C. Fontaine, Cristina L. Mendoza, William A. Niese, Karlene Goller, Susan Weiner, Richard M. Schmidt, Jr., R. Bruce Rich, Slade R. Metcalf, Jane E. Kirtley, Bruce W. Sanford,* and *Henry S. Hoberman;* for Trial Lawyers for Public Justice, P. C., by *Leslie A. Brueckner* and *Arthur H. Bryant;* for Richard L. Blatt et al. by *Mr. Blatt, pro se,* and *Robert W. Hammesfahr, pro se;* for James D. A. Boyle et al. by *Arthur F. McEvoy III, pro se;* and for Law and Economics Scholars et al. by *Mark M. Hager, pro se.*

is whether a $2 million punitive damages award to the purchaser of one of these cars exceeds the constitutional limit.

I

In January 1990, Dr. Ira Gore, Jr. (respondent), purchased a black BMW sports sedan for $40,750.88 from an authorized BMW dealer in Birmingham, Alabama. After driving the car for approximately nine months, and without noticing any flaws in its appearance, Dr. Gore took the car to "Slick Finish," an independent detailer, to make it look " 'snazzier than it normally would appear.' " 646 So. 2d 619, 621 (Ala. 1994). Mr. Slick, the proprietor, detected evidence that the car had been repainted.[1] Convinced that he had been cheated, Dr. Gore brought suit against petitioner BMW of North America (BMW), the American distributor of BMW automobiles.[2] Dr. Gore alleged, *inter alia*, that the failure to disclose that the car had been repainted constituted suppression of a material fact.[3] The complaint prayed for $500,000 in compensatory and punitive damages, and costs.

At trial, BMW acknowledged that it had adopted a nationwide policy in 1983 concerning cars that were damaged in the course of manufacture or transportation. If the cost of repairing the damage exceeded 3 percent of the car's suggested retail price, the car was placed in company service for a period of time and then sold as used. If the repair cost did not exceed 3 percent of the suggested retail price, however, the car was sold as new without advising the dealer that any repairs had been made. Because the $601.37 cost of repainting Dr. Gore's car was only about 1.5 percent of its suggested retail price, BMW did not disclose the damage or repair to the Birmingham dealer.

---

[1] The top, hood, trunk, and quarter panels of Dr. Gore's car were repainted at BMW's vehicle preparation center in Brunswick, Georgia. The parties presumed that the damage was caused by exposure to acid rain during transit between the manufacturing plant in Germany and the preparation center.

[2] Dr. Gore also named the German manufacturer and the Birmingham dealership as defendants.

[3] Alabama codified its common-law cause of action for fraud in a 1907 statute that is still in effect. *Hackmeyer* v. *Hackmeyer*, 268 Ala. 329, 333, 106 So. 2d 245, 249 (1958). The statute provides: "Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." Ala. Code § 6–5–102 (1993); see Ala. Code § 4299 (1907).

Dr. Gore asserted that his repainted car was worth less than a car that had not been refinished. To prove his actual damages of $4,000, he relied on the testimony of a former BMW dealer, who estimated that the value of a repainted BMW was approximately 10 percent less than the value of a new car that had not been damaged and repaired.[4] To support his claim for punitive damages, Dr. Gore introduced evidence that since 1983 BMW had sold 983 refinished cars as new, including 14 in Alabama, without disclosing that the cars had been repainted before sale at a cost of more than $300 per vehicle.[5] Using the actual damage estimate of $4,000 per vehicle, Dr. Gore argued that a punitive award of $4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth.

In defense of its disclosure policy, BMW argued that it was under no obligation to disclose repairs of minor damage to new cars and that Dr. Gore's car was as good as a car with the original factory finish. It disputed Dr. Gore's assertion that the value of the car was impaired by the repainting and argued that this good-faith belief made a punitive award inappropriate. BMW also maintained that transactions in jurisdictions other than Alabama had no relevance to Dr. Gore's claim.

---

[4] The dealer who testified to the reduction in value is the former owner of the Birmingham dealership sued in this action. He sold the dealership approximately one year before the trial.

[5] Dr. Gore did not explain the significance of the $300 cutoff.

The jury returned a verdict finding BMW liable for compensatory damages of $4,000. In addition, the jury assessed $4 million in punitive damages, based on a determination that the nondisclosure policy constituted "gross, oppressive or malicious" fraud.[6] See Ala. Code §§6–11–20, 6–11–21 (1993).

BMW filed a post-trial motion to set aside the punitive damages award. The company introduced evidence to establish that its nondisclosure policy was consistent with the laws of roughly 25 States defining the disclosure obligations of automobile manufacturers, distributors, and dealers. The most stringent of these statutes required disclosure of repairs costing more than 3 percent of the suggested retail price; none mandated disclosure of less costly repairs.[7] Relying on these statutes, BMW contended that its conduct was lawful in these States and therefore could not provide the basis for an award of punitive damages.

BMW also drew the court's attention to the fact that its nondisclosure policy had never been adjudged unlawful before this action was filed. Just months before Dr. Gore's case went to trial, the jury in a similar lawsuit filed by another Alabama BMW purchaser found that BMW's failure to disclose paint repair constituted fraud. *Yates* v. *BMW of North America, Inc.*, 642 So. 2d 937 (Ala. 1993).[8] Before the judgment in this case, BMW changed its policy by taking steps to avoid the sale of any refinished vehicles in Alabama and two other States. When the $4 million verdict was returned in this case, BMW promptly instituted a nationwide policy of full disclosure of all repairs, no matter how minor.

---

[6] The jury also found the Birmingham dealership liable for Dr. Gore's compensatory damages and the German manufacturer liable for both the compensatory and punitive damages. The dealership did not appeal the judgment against it. The Alabama Supreme Court held that the trial court did not have jurisdiction over the German manufacturer and therefore reversed the judgment against that defendant.

[7] BMW acknowledged that a Georgia statute enacted *after* Dr. Gore purchased his car would require disclosure of similar repairs to a car before it was sold in Georgia. Ga. Code Ann. §§40–1–5(b)–(e) (1994).

[8] While awarding a comparable amount of compensatory damages, the *Yates* jury awarded no punitive damages at all. In *Yates*, the plaintiff also relied on the 1983 nondisclosure policy, but instead of offering evidence of 983 repairs costing more than $300 each, he introduced a bulk exhibit

In response to BMW's arguments, Dr. Gore asserted that the policy change demonstrated the efficacy of the punitive damages award. He noted that while no jury had held the policy unlawful, BMW had received a number of customer complaints relating to undisclosed repairs and had settled some lawsuits.[9] Finally, he maintained that the disclosure statutes of other States were irrelevant because BMW had failed to offer any evidence that the disclosure statutes supplanted, rather than supplemented, existing causes of action for common-law fraud.

The trial judge denied BMW's post-trial motion, holding, *inter alia*, that the award was not excessive. On appeal, the Alabama Supreme Court also rejected BMW's claim that the award exceeded the constitutionally permissible amount. 646 So. 2d 619 (1994). The court's excessiveness inquiry applied the factors articulated in *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 223–224 (Ala. 1989), and approved in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 21–22 (1991). 646 So. 2d, at 624–625. Based on its analysis, the court concluded that BMW's conduct was "reprehensible"; the nondisclosure was profitable for the company; the judgment "would not have a substantial impact upon [BMW's] financial position"; the litigation had been expensive; no criminal sanctions had been imposed on BMW for the same conduct; the award of *no* pu-

---

containing 5,856 repair bills to show that petitioner had sold over 5,800 new BMW vehicles without disclosing that they had been repaired.

[9] Prior to the lawsuits filed by Dr. Yates and Dr. Gore, BMW and various BMW dealers had been sued 14 times concerning presale paint or damage repair. According to the testimony of BMW's in-house counsel at the postjudgment hearing on damages, only one of the suits concerned a car repainted by BMW.

nitive damages in *Yates* reflected "the inherent uncertainty of the trial process"; and the punitive award bore a "reasonable relationship" to "the harm that was likely to occur from [BMW's] conduct as well as . . . the harm that actually occurred." 646 So. 2d, at 625–627.

The Alabama Supreme Court did, however, rule in BMW's favor on one critical point: The court found that the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions. *Id.*, at 627. Having found the verdict tainted, the court held that "a constitutionally reasonable punitive damages award in this case is $2,000,000," *id.*, at 629, and therefore ordered a remittitur in that amount.[10] The court's discussion of the amount of its remitted award expressly disclaimed any reliance on "acts that occurred in other jurisdictions"; instead, the court explained that it had used a "comparative analysis" that considered Alabama cases, "along with cases from other jurisdictions, involving the sale of an automobile where the seller misrepresented the condition of the vehicle and the jury awarded punitive damages to the purchaser."[11] *Id.*, at 628.

---

[10] The Alabama Supreme Court did not indicate whether the $2 million figure represented the court's independent assessment of the appropriate level of punitive damages, or its determination of the maximum amount that the jury could have awarded consistent with the Due Process Clause.

[11] Other than *Yates* v. *BMW of North America, Inc.*, 642 So. 2d 937 (1993), in which no punitive damages were awarded, the Alabama Supreme Court cited no such cases. In another portion of its opinion, 646 So. 2d, at 629, the court did cite five Alabama cases, none of which involved either a dispute arising out of the purchase of an automobile or an award of punitive damages. *G. M. Mosley Contractors, Inc.* v. *Phillips*, 487 So. 2d 876, 879 (1986); *Hollis* v. *Wyrosdick*, 508 So. 2d 704 (1987); *Campbell* v. *Burns*, 512 So. 2d 1341, 1343 (1987); *Ashbee* v. *Brock*, 510 So. 2d 214 (1987); and *Jawad* v. *Granade*, 497 So. 2d 471 (1986). All of these cases support the proposition that appellate courts in Alabama presume that jury verdicts are correct. In light of the Alabama Supreme Court's conclusion that (1) the jury had computed its award by multiplying $4,000 by the number of refinished vehicles sold in the United States and

Because we believed that a review of this case would help to illuminate "the character of the standard that will identify unconstitutionally excessive awards" of punitive damages, see *Honda Motor Co.* v. *Oberg,* 512 U. S. 415, 420 (1994), we granted certiorari, 513 U. S. 1125 (1995).

II

Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 350 (1974); *Newport* v. *Fact Concerts, Inc.,* 453 U. S. 247, 266–267 (1981); *Haslip,* 499 U. S., at 22. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. See *TXO,* 509 U. S., at 456; *Haslip,* 499 U. S., at 21, 22. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. Cf. *TXO,* 509 U. S., at 456. For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. We therefore focus our attention first on the scope of Alabama's legitimate interests in punishing BMW and deterring it from future misconduct.

No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring auto-

---

(2) that the award should have been based on Alabama conduct, respect for the error-free portion of the jury verdict would seem to produce an award of $56,000 ($4,000 multiplied by 14, the number of repainted vehicles sold in Alabama).

mobile distributors to disclose presale repairs that affect the value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement by applying principles of contract and tort law.[12] Other States have enacted various forms of legislation that define the disclosure obligations of automobile manufacturers, distributors, and dealers.[13]

---

[12] See, *e. g., Rivers* v. *BMW of North America, Inc.*, 214 Ga. App. 880, 449 S. E. 2d 337 (1994) (nondisclosure of presale paint repairs that occurred before state disclosure statute enacted); *Wedmore* v. *Jordan Motors, Inc.*, 589 N. E. 2d 1180 (Ind. App. 1992) (same).

[13] Four States require disclosure of vehicle repairs costing more than 3 percent of suggested retail price. Ariz. Rev. Stat. Ann. § 28-1304.03 (1989); N. C. Gen. Stat. § 20-305.1(d)(5a) (1995); S. C. Code § 56-32-20 (Supp. 1995); Va. Code Ann. § 46.2-1571(D) (Supp. 1995). An additional three States mandate disclosure when the cost of repairs exceeds 3 percent or $500, whichever is greater. Ala. Code § 8-19-5(22)(c) (1993); Cal. Veh. Code Ann. §§ 9990-9991 (West Supp. 1996); Okla. Stat., Tit. 47, § 1112.1 (1991). Indiana imposes a 4 percent disclosure threshold. Ind. Code §§ 9-23-4-4, 9-23-4-5 (1993). Minnesota requires disclosure of repairs costing more than 4 percent of suggested retail price or $500, whichever is greater. Minn. Stat. § 325F.664 (1994). New York requires disclosure when the cost of repairs exceeds 5 percent of suggested retail price. N. Y. Gen. Bus. Law §§ 396-p(5)(a), (d) (McKinney Supp. 1996). Vermont imposes a 5 percent disclosure threshold for the first $10,000 in repair costs and 2 percent thereafter. Vt. Stat. Ann., Tit. 9, § 4087(d) (1993). Eleven States mandate disclosure only of damage costing more than 6 percent of retail value to repair. Ark. Code Ann. § 23-112-705 (1992); Idaho Code § 49-1624 (1994); Ill. Comp. Stat., ch. 815, § 710/5 (1994); Ky. Rev. Stat. Ann. § 190.0491(5) (Baldwin 1988); La. Rev. Stat. Ann. § 32:1260 (West Supp. 1995); Miss. Motor Vehicle Comm'n, Regulation No. 1 (1992); N. H. Rev. Stat. Ann. § 357-C:5(III)(d) (1995); Ohio Rev. Code Ann. § 4517.61 (1994); R. I. Gen. Laws §§ 31-5.1-18(d), (f) (1995); Wis. Stat. § 218.01(2d)(a) (1994); Wyo. Stat. § 31-16-115 (1994). Two States require disclosure of repairs costing $3,000 or more. See Iowa Code Ann. § 321.69 (Supp. 1996); N. D. Admin. Code § 37-09-01-01 (1992). Georgia mandates disclosure of paint damage that costs more than $500 to repair. Ga. Code Ann. §§ 40-1-5(b)-(e) (1994) (enacted after respondent purchased his car). Florida re-

The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.

That diversity demonstrates that reasonable people may disagree about the value of a full disclosure requirement. Some legislatures may conclude that affirmative disclosure requirements are unnecessary because the self-interest of those involved in the automobile trade in developing and maintaining the goodwill of their customers will motivate them to make voluntary disclosures or to refrain from selling cars that do not comply with self-imposed standards. Those legislatures that do adopt affirmative disclosure obligations may take into account the cost of government regulation, choosing to draw a line exempting minor repairs from such a requirement. In formulating a disclosure standard, States may also consider other goals, such as providing a "safe harbor" for automobile manufacturers, distributors, and dealers against lawsuits over minor repairs.[14]

We may assume, *arguendo*, that it would be wise for every State to adopt Dr. Gore's preferred rule, requiring full disclosure of every presale repair to a car, no matter how trivial and regardless of its actual impact on the value of the car.

---

quires dealers to disclose paint repair costing more than $100 of which they have actual knowledge. Fla. Stat. § 320.27(9)(n) (1992). Oregon requires manufacturers to disclose all "postmanufacturing" damage and repairs. It is unclear whether this mandate would apply to repairs such as those at issue here. Ore. Rev. Stat. § 650.155 (1991).

Many, but not all, of the statutes exclude from the computation of repair cost the value of certain components—typically items such as glass, tires, wheels and bumpers—when they are replaced with identical manufacturer's original equipment. *E. g.*, Cal. Veh. Code Ann. §§ 9990–9991 (West Supp. 1996); Ga. Code Ann. §§ 40–1–5(b)–(e) (1994); Ill. Comp. Stat., ch. 815, § 710/5 (1994); Ky. Rev. Stat. Ann. § 190.0491(5) (Baldwin 1988); Okla. Stat., Tit. 47, § 1112.1 (1991); Va. Code Ann. § 46.2–1571(D) (Supp. 1995); Vt. Stat. Ann., Tit. 9, § 4087(d) (1993).

[14] Also, a state legislature might plausibly conclude that the administrative costs associated with full disclosure would have the effect of raising car prices to the State's residents.

But while we do not doubt that Congress has ample authority to enact such a policy for the entire Nation,[15] it is clear that no single State could do so, or even impose its own policy choice on neighboring States. See *Bonaparte* v. *Tax Court,* 104 U. S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular").[16] Similarly, one State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, *Gibbons* v. *Ogden,* 9 Wheat. 1, 194–196 (1824), but is also constrained by the need to respect the interests of other States, see, *e. g., Healy* v. *Beer Institute,* 491 U. S. 324, 335–336 (1989) (the Constitution has a "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres" (footnote omitted)); *Edgar* v. *MITE Corp.*, 457 U. S. 624, 643 (1982).

---

[15] Federal disclosure requirements are, of course, a familiar part of our law. See, *e. g.,* the Federal Food, Drug, and Cosmetic Act, as added by the Nutrition Labeling and Education Act of 1990, 104 Stat. 2353, 21 U. S. C. §343; the Truth In Lending Act, 82 Stat. 148, as amended, 15 U. S. C. §1604; the Securities Exchange Act of 1934, 48 Stat. 892, 894, as amended, 15 U. S. C. §§78l–78m; Federal Cigarette Labeling and Advertising Act, 79 Stat. 283, as amended, 15 U. S. C. §1333; Alcoholic Beverage Labeling Act of 1988, 102 Stat. 4519, 27 U. S. C. §215.

[16] See also *Bigelow* v. *Virginia,* 421 U. S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins. Co.* v. *Head,* 234 U. S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound"); *Huntington* v. *Attrill,* 146 U. S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States").

We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.[17] Before this Court Dr. Gore argued that the large punitive damages award was necessary to induce BMW to change the nationwide policy that it adopted in 1983.[18] But by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy. Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.[19] Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

---

[17] State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief").

[18] Brief for Respondent 11–12, 23, 27–28; Tr. of Oral Arg. 50–54. Dr. Gore's interest in altering the nationwide policy stems from his concern that BMW would not (or could not) discontinue the policy in Alabama alone. Brief for Respondent 11. "If Alabama were limited to imposing punitive damages based only on BMW's gain from fraudulent sales in Alabama, the resulting award would have no prospect of protecting Alabama consumers from fraud, as it would provide no incentive for BMW to alter the unitary, national policy of nondisclosure which yielded BMW millions of dollars in profits." *Id.*, at 23. The record discloses no basis for Dr. Gore's contention that BMW could not comply with Alabama's law without changing its nationwide policy.

In this case, we accept the Alabama Supreme Court's interpretation of the jury verdict as reflecting a computation of the amount of punitive damages "based in large part on conduct that happened in other jurisdictions." 646 So. 2d, at 627. As the Alabama Supreme Court noted, neither the jury nor the trial court was presented with evidence that any of BMW's out-of-state conduct was unlawful. "The only testimony touching the issue showed that approximately 60% of the vehicles that were refinished were sold in states where failure to disclose the repair was not an unfair trade practice." *Id.*, at 627, n. 6.[20] The Alabama Supreme Court therefore properly eschewed reliance on BMW's out-of-state conduct, *id.*, at 628, and based its remitted award solely on conduct that occurred within Alabama.[21] The award must be analyzed in the light of the same conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire Nation. When the scope of the interest in punishment and deterrence that an Alabama court may appropriately consider is properly limited, it is apparent—for reasons that we shall now address—that this award is grossly excessive.

---

[19] See *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"). Our cases concerning recidivist statutes are not to the contrary. Habitual offender statutes permit the sentencing court to enhance a defendant's punishment for a crime in light of prior convictions, including convictions in foreign jurisdictions. See *e. g.*, Ala. Code § 13A–5–9 (1994); Cal. Penal Code Ann. §§ 667.5(f), 668 (West Supp. 1996); Ill. Comp. Stat., ch. 720, § 5/33B–1 (1994); N. Y. Penal Law §§ 70.04, 70.06, 70.08, 70.10 (McKinney 1987 and Supp. 1996); Tex. Penal Code Ann. § 12.42 (1994 and Supp. 1995–1996). A sentencing judge may even consider past criminal behavior which did not result in a conviction and lawful conduct that bears on the defendant's character and prospects for rehabilitation. *Williams* v. *New York*, 337 U. S. 241 (1949). But we have never held that a sentencing court could properly *punish* lawful conduct. This distinction is precisely the one we draw here. See n. 21, *infra*.

[20] Given that the verdict was based in part on out-of-state conduct that was lawful where it occurred, we need not consider whether one State may properly attempt to change a tortfeasor's *unlawful* conduct in another State.

III

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.[22] Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases. We discuss these considerations in turn.

---

[21] Of course, the fact that the Alabama Supreme Court correctly concluded that it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction does not mean that evidence describing out-of-state transactions is irrelevant in a case of this kind. To the contrary, as we stated in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 462, n. 28 (1993), such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct.

[22] See *Miller* v. *Florida*, 482 U. S. 423 (1987) (*Ex Post Facto* Clause violated by retroactive imposition of revised sentencing guidelines that provided longer sentence for defendant's crime); *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964) (retroactive application of new construction of statute violated due process); *id.*, at 350–355 (citing cases); *Lankford* v. *Idaho*, 500 U. S. 110 (1991) (due process violated because defendant and his counsel did not have adequate notice that judge might impose death sentence). The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against "judgments without notice" afforded by the Due Process Clause, *Shaffer* v. *Heitner*, 433 U. S. 186, 217 (1977) (STEVENS, J., concurring in judgment), is implicated by civil *penalties*.

Degree of Reprehensibility

Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.[23] As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of his offense." *Day* v. *Woodworth,* 13 How. 363, 371 (1852). See also *St. Louis, I. M. & S. R. Co.* v. *Williams,* 251 U. S. 63, 66–67 (1919) (punitive award may not be "wholly disproportioned to the offense"); *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 301 (1989) (O'CONNOR, J., concurring in part and dissenting in part) (reviewing court "should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages").[24] This principle reflects the accepted view that some wrongs are more blameworthy than others. Thus, we have said that

---

[23] "The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages." Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 387 (1994).

[24] The principle that punishment should fit the crime "is deeply rooted and frequently repeated in common-law jurisprudence." *Solem* v. *Helm,* 463 U. S. 277, 284 (1983). See *Burkett* v. *Lanata,* 15 La. Ann. 337, 339 (1860) (punitive damages should be "commensurate to the nature of the offence"); *Blanchard* v. *Morris,* 15 Ill. 35, 36 (1853) ("[W]e cannot say [the exemplary damages] are excessive under the circumstances; for the proofs show that threats, violence, and imprisonment, were accompanied by mental fear, torture, and agony of mind"); *Louisville & Northern R. Co.* v. *Brown,* 127 Ky. 732, 749, 106 S. W. 795, 799 (1908) ("We are not aware of any case in which the court has sustained a verdict as large as this one unless the injuries were permanent").

"nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Solem* v. *Helm,* 463 U. S. 277, 292–293 (1983). Similarly, "trickery and deceit," *TXO,* 509 U. S., at 462, are more reprehensible than negligence. In *TXO,* both the West Virginia Supreme Court and the Justices of this Court placed special emphasis on the principle that punitive damages may not be "grossly out of proportion to the severity of the offense."[25] *Id.,* at 453, 462. Indeed, for JUSTICE KENNEDY, the defendant's intentional malice was the decisive element in a "close and difficult" case. *Id.,* at 468.[26]

In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature. The presale refinishing of the car had no effect on its performance or safety features, or even its appearance for at least nine months after his purchase. BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, *id.,* at 453, or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.

Dr. Gore contends that BMW's conduct was particularly reprehensible because nondisclosure of the repairs to his car formed part of a nationwide pattern of tortious conduct. Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. See *id.*, at 462, n. 28. Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance. See *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948).

---

[25] *Pacific Mut. Life Ins. Co.* v. *Haslip,* 499 U. S. 1, 22 (1991).

[26] The dissenters also recognized that "TXO's conduct was clearly wrongful, calculated, and improper . . . ." *TXO,* 509 U. S., at 482 (opinion of O'CONNOR, J.).

In support of his thesis, Dr. Gore advances two arguments. First, he asserts that the state disclosure statutes supplement, rather than supplant, existing remedies for breach of contract and common-law fraud. Thus, according to Dr. Gore, the statutes may not properly be viewed as immunizing from liability the nondisclosure of repairs costing less than the applicable statutory threshold. Brief for Respondent 18–19. Second, Dr. Gore maintains that BMW should have anticipated that its failure to disclose similar repair work could expose it to liability for fraud. *Id.*, at 4–5.

We recognize, of course, that only state courts may authoritatively construe state statutes. As far as we are aware, at the time this action was commenced no state court had explicitly addressed whether its State's disclosure statute provides a safe harbor for nondisclosure of presumptively minor repairs or should be construed instead as supplementing common-law duties.[27] A review of the text of the stat-

---

[27] In *Jeter* v. *M & M Dodge, Inc.*, 634 So. 2d 1383 (La. App. 1994), a Louisiana Court of Appeals suggested that the Louisiana disclosure statute functions as a safe harbor. Finding that the cost of repairing presale damage to the plaintiff's car exceeded the statutory disclosure threshold, the court held that the disclosure statute did not provide a defense to the action. *Id.*, at 1384.

During the pendency of this litigation, Alabama enacted a disclosure statute which defines "material" damage to a new car as damage requiring repairs costing in excess of 3 percent of suggested retail price or $500, whichever is greater. Ala. Code § 8–19–5(22) (1993). After its decision in this case, the Alabama Supreme Court stated in dicta that the remedies available under this section of its Deceptive Trade Practices Act did not displace or alter pre-existing remedies available under either the common law or other statutes. *Hines* v. *Riverside Chevrolet-Olds, Inc.*, 655 So. 2d 909, 917, n. 2 (1994). It refused, however, to "recognize, or impose on utes, however, persuades us that in the absence of a state-court determination to the contrary, a corporate executive could reasonably interpret the disclosure requirements as establishing safe harbors. In California, for example, the disclosure statute defines "material" damage to a motor vehicle as damage requiring repairs costing in excess of 3 percent of the suggested retail price or $500, whichever is greater. Cal. Veh. Code Ann. § 9990 (West Supp. 1996). The Illinois statute states that in cases in which disclosure is not required, "nondisclosure does not constitute a misrepresentation or omission of fact." Ill. Comp. Stat., ch. 815, § 710/5 (1994).[28] Perhaps the statutes may also be interpreted in another way. We simply emphasize that the record contains no evidence that BMW's decision to follow a disclosure policy that coincided with the strictest extant state statute was sufficiently reprehensible to justify a $2 million award of punitive damages.

---

automobile manufacturers, a general duty to disclose every repair of damage, however slight, incurred during the manufacturing process." *Id.*, at 921. Instead, it held that whether a defendant has a duty to disclose is a question of fact "for the jury to determine." *Id.*, at 918. In reaching that conclusion it overruled two earlier decisions that seemed to indicate that as a matter of law there was no disclosure obligation in cases comparable to this one. *Id.*, at 920 (overruling *Century 21-Reeves Realty, Inc.* v. *McConnell Cadillac, Inc.*, 626 So. 2d 1273 (1993), and *Cobb* v. *Southeast Toyota Distributors, Inc.*, 569 So. 2d 395 (1990)).

[28] See also Ariz. Rev. Stat. Ann. § 28–1304.03 (1989) ("[I]f disclosure is not required under this section, a purchaser may not revoke or rescind a sales contract due solely to the fact that the new motor vehicle was damaged and repaired prior to completion of the sale"); Ind. Code § 9–23–4–5 (1993) (providing that "[r]epaired damage to a customer-ordered new motor vehicle not exceeding four percent (4%) of the manufacturer's suggested retail price does not need to be disclosed at the time of sale"); N. C. Gen. Stat. § 20–305.1(e) (1993) (requiring disclosure of repairs costing more than 5 percent of suggested retail price and prohibiting revocation or rescission of sales contract on the basis of less costly repairs); Okla. Stat., Tit. 47, § 1112.1 (1991) (defining "material" damage to a car as damage requiring repairs costing in excess of 3 percent of suggested retail price or $500, whichever is greater).

Dr. Gore's second argument for treating BMW as a recidivist is that the company should have anticipated that its actions would be considered fraudulent in some, if not all, jurisdictions. This contention overlooks the fact that actionable fraud requires a *material* misrepresentation or omission.[29] This qualifier invites line-drawing of just the sort engaged in by States with disclosure statutes and by BMW. We do not think it can be disputed that there may exist minor imperfections in the finish of a new car that can be repaired (or indeed, left unrepaired) without materially affecting the car's value.[30] There is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers. For this purpose, BMW could reasonably rely on state disclosure statutes for guidance. In this regard, it is also significant that there is no evidence that BMW persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions.[31]

Finally, the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*. *Haslip*, 499 U. S., at 5; *TXO*, 509 U. S., at 453. We accept, of course, the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. But the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists.

---

[29] Restatement (Second) of Torts §538 (1977); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §108 (5th ed. 1984).

[30] The Alabama Supreme Court has held that a car may be considered "new" as a matter of law even if its finish contains minor cosmetic flaws. *Wilburn* v. *Larry Savage Chevrolet, Inc.*, 477 So. 2d 384 (1985). We note also that at trial respondent only introduced evidence of undisclosed paint damage to new cars repaired at a cost of $300 or more. This decision suggests that respondent believed that the jury might consider some repairs too *de minimis* to warrant disclosure.

[31] Before the verdict in this case, BMW had changed its policy with respect to Alabama and two other States. Five days after the jury award, BMW altered its nationwide policy to one of full disclosure.

That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award. Because this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct, we are persuaded that BMW's conduct was not sufficiently reprehensible to warrant imposition of a $2 million exemplary damages award.

Ratio

The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. See *TXO*, 509 U. S., at 459; *Haslip*, 499 U. S., at 23. The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree.[32] Scholars have identified a number of early English statutes authorizing the award of multiple damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages.[33] Our decisions in both *Haslip* and *TXO* endorsed the proposition that a comparison between the compensatory award and the punitive award is significant.

---

[32] See, *e. g.*, *Grant* v. *McDonogh*, 7 La. Ann. 447, 448 (1852) ("[E]xemplary damages allowed should bear some proportion to the real damage sustained"); *Saunders* v. *Mullen*, 66 Iowa 728, 729, 24 N. W. 529 (1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large"); *Flannery* v. *Baltimore & Ohio R. Co.*, 15 D. C. 111, 125 (1885) (when punitive damages award "is out of all proportion to the injuries received, we feel it our duty to interfere"); *Houston & Texas Central R. Co.* v. *Nichols*, 9 Am. & Eng. R. R. Cas. 361, 365 (Tex. 1882) ("Exemplary damages, when allowed, should bear proportion to the actual damages sustained"); *McCarthy* v. *Niskern*, 22 Minn. 90, 91–92 (1875) (punitive damages "enormously in excess of what may justly be regarded as compensation" for the injury must be set aside "to prevent injustice").

In *Haslip* we concluded that even though a punitive damages award of "more than 4 times the amount of compensatory damages" might be "close to the line," it did not "cross the line into the area of constitutional impropriety." 499 U. S., at 23–24. *TXO*, following dicta in *Haslip*, refined this analysis by confirming that the proper inquiry is "'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'" *TXO*, 509 U. S., at 460 (emphasis in original), quoting *Haslip*, 499 U. S., at 21. Thus, in upholding the $10 million award in *TXO*, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1.[34]

---

[33] Owen, *supra* n. 23, at 368, and n. 23. One English statute, for example, provides that officers arresting persons out of their jurisdiction shall pay double damages. 3 Edw., I., ch. 35. Another directs that in an action for forcible entry or detainer, the plaintiff shall recover treble damages. 8 Hen. VI, ch. 9, § 6.

Present-day federal law allows or mandates imposition of multiple damages for a wide assortment of offenses, including violations of the antitrust laws, see § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 15, and the Racketeer Influenced and Corrupt Organizations Act, see 18 U. S. C. § 1964, and certain breaches of the trademark laws, see § 35 of the Trademark Act of 1946, 60 Stat. 439, as amended, 15 U. S. C. § 1117, and the patent laws, see 66 Stat. 813, 35 U. S. C. § 284.

[34] "While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme. Thus, even if the actual value of the 'potential harm' to respondents is not be-

The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury.[35] Moreover, there is no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy. The disparity in this case is thus dramatically greater than those considered in *Haslip* and *TXO*.[36]

Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award. *TXO*, 509 U. S., at 458.[37] Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said . . . in *Haslip:* 'We need not, and

---

tween $5 million and $8.3 million, but is closer to $4 million, or $2 million, or even $1 million, the disparity between the punitive award and the potential harm does not, in our view, 'jar one's constitutional sensibilities.'" *TXO*, 509 U. S., at 462, quoting *Haslip*, 499 U. S., at 18.

[35] Even assuming each repainted BMW suffers a diminution in value of approximately $4,000, the award is 35 times greater than the total damages of all 14 Alabama consumers who purchased repainted BMW's.

[36] The ratio here is also dramatically greater than any award that would be permissible under the statutes and proposed statutes summarized in the appendix to JUSTICE GINSBURG's dissenting opinion. *Post*, at 615–616.

[37] Conceivably the Alabama Supreme Court's selection of a 500-to-1 ratio was an application of JUSTICE SCALIA's identification of one possible reading of the plurality opinion in *TXO:* Any future due process challenge to a punitive damages award could be disposed of with the simple observation that "this is no worse than *TXO*." 509 U. S., at 472 (SCALIA, J., concurring in judgment). As we explain in the text, this award is significantly worse than the award in *TXO*.

indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.'" *Id.*, at 458 (quoting *Haslip*, 499 U. S., at 18). In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow." *TXO*, 509 U. S., at 481 (O'CONNOR, J., dissenting).

Sanctions for Comparable Misconduct

Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness. As JUSTICE O'CONNOR has correctly observed, a reviewing court engaged in determining whether an award of punitive damages is excessive should "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S., at 301 (opinion concurring in part and dissenting in part). In *Haslip*, 499 U. S., at 23, the Court noted that although the exemplary award was "much in excess of the fine that could be imposed," imprisonment was also authorized in the criminal context.[38] In this case the $2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance.

---

[38] Although the Court did not address the size of the punitive damages award in *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238 (1984), the dissenters commented on its excessive character, noting that the "$10 million [punitive damages award] that the jury imposed is 100 times greater than the maximum fine that may be imposed . . . for a single violation of federal standards" and "more than 10 times greater than the largest single fine that the Commission has ever imposed." *Id.*, at 263 (BLACKMUN, J., dissenting). In *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), the Court observed that the punitive award for libel was "one thousand times greater than the maximum fine provided by the Alabama criminal statute," and concluded that the "fear of damage awards under a rule such as

The maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000;[39] other States authorize more severe sanctions, with the maxima ranging from $5,000 to $10,000.[40] Significantly, some statutes draw a distinction between first offenders and recidivists; thus, in New York the penalty is $50 for a first offense and $250 for subsequent offenses. None of these statutes would provide an out-of-state distributor with fair notice that the first violation—or, indeed the first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty. Moreover, at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment.

The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers. In

---

that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.*, at 277.

[39] Ala. Code § 8–19–11(b) (1993).

[40] See, *e. g.*, Ark. Code Ann. § 23–112–309(b) (1992) (up to $5,000 for violation of state Motor Vehicle Commission Act that would allow suspension of dealer's license; up to $10,000 for violation of Act that would allow revocation of dealer's license); Fla. Stat. § 320.27(12) (1992) (up to $1,000); Ga. Code Ann. §§ 40–1–5(g), 10–1–397(a) (1994 and Supp. 1996) (up to $2,000 administratively; up to $5,000 in superior court); Ind. Code § 9–23–6–4 (1993) ($50 to $1,000); N. H. Rev. Stat. Ann. §§ 357–C:15, 651:2 (1995 and Supp. 1995) (corporate fine of up to $20,000); N. Y. Gen. Bus. Law § 396–p(6) (McKinney Supp. 1995) ($50 for first offense; $250 for subsequent offenses).

the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the Alabama Supreme Court in this case.

IV

We assume, as the juries in this case and in the *Yates* case found, that the undisclosed damage to the new BMW's affected their actual value. Notwithstanding the evidence adduced by BMW in an effort to prove that the repainted cars conformed to the same quality standards as its other cars, we also assume that it knew, or should have known, that as time passed the repainted cars would lose their attractive appearance more rapidly than other BMW's. Moreover, we of course accept the Alabama courts' view that the state interest in protecting its citizens from deceptive trade practices justifies a sanction in addition to the recovery of compensatory damages. We cannot, however, accept the conclusion of the Alabama Supreme Court that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty.

The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce. While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.

As in *Haslip*, we are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award. Unlike that case, however, we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit.[41] Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers is a matter that should be addressed by the state court in the first instance.

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE O'CONNOR and JUSTICE SOUTER join, concurring.

The Alabama state courts have assessed the defendant $2 million in "punitive damages" for having knowingly failed to tell a BMW automobile buyer that, at a cost of $600, it had repainted portions of his new $40,000 car, thereby lowering its potential resale value by about 10%. The Court's opinion, which I join, explains why we have concluded that this award, in this case, was "grossly excessive" in relation to legitimate punitive damages objectives, and hence an arbitrary deprivation of life, liberty, or property in violation of the Due Process Clause. See *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 453, 454 (1993) (A "grossly excessive" punitive award amounts to an "arbitrary deprivation of property without due process of law") (plurality opinion). Members of this Court have generally thought, however, that if "fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity." *Id.*, at 457. See also *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 40–42 (1991) (KENNEDY, J., concurring in judgment). And the Court also has found that punitive damages procedures very similar to those followed here were not, by themselves, fundamentally unfair. *Id.*, at 15–24. Thus, I believe it important to explain why this presumption of validity is overcome in this instance.

---

[41] JUSTICE GINSBURG expresses concern that we are "the *only* federal court policing" this limit. *Post*, at 613. The small number of punitive damages questions that we have reviewed in recent years, together with the fact that this is the first case in decades in which we have found that a punitive damages award exceeds the constitutional limit, indicates that this concern is at best premature. In any event, this consideration surely does not justify an abdication of our responsibility to enforce constitutional protections in an extraordinary case such as this one.

The reason flows from the Court's emphasis in *Haslip* upon the constitutional importance of legal standards that provide "reasonable constraints" within which "discretion is exercised," that assure "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages," and permit "appellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.*, at 20–21. See also *id.*, at 18 ("[U]nlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities").

This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion. *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986); *Dent* v. *West Virginia*, 129 U. S. 114, 123 (1889). Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself. See *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally").

Legal standards need not be precise in order to satisfy this constitutional concern. See *Haslip, supra,* at 20 (comparing punitive damages standards to such legal standards as "reasonable care," "due diligence," and "best interests of the child") (internal quotation marks omitted). But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior. The standards the Alabama courts applied here are vague and open ended to the point where they risk arbitrary results. In my view, although the vagueness of those standards does not, by itself, violate due process, see *Haslip, supra,* it does invite the kind of scrutiny the Court has given the particular verdict before us. See *id.,* at 18 ("[C]oncerns of . . . adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus"); *TXO, supra,* at 475 ("[I]t cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict") (O'CONNOR, J., dissenting). This is because the standards, as the Alabama Supreme Court authoritatively interpreted them here, provided no significant constraints or protection against arbitrary results.

First, the Alabama statute that permits punitive damages does not itself contain a standard that readily distinguishes between conduct warranting very small, and conduct warranting very large, punitive damages awards. That statute permits punitive damages in cases of "oppression, fraud, wantonness, or malice." Ala. Code § 6–11–20(a) (1993). But the statute goes on to define those terms broadly, to encompass far more than the egregious conduct that those terms, at first reading, might seem to imply. An intentional misrepresentation, made through a statement or silence, can easily amount to "fraud" sufficient to warrant punitive damages. See § 6–11–20(b)(1) ("Fraud" includes "intentional . . . concealment of a material fact the concealing party had a duty to disclose, which was gross, *oppressive, or malicious* and committed with the intention . . . of thereby depriving a person or entity of property") (emphasis added); § 6–11–20(b)(2) ("Malice" includes *any "wrongful act without* just cause or *excuse . . . [w]ith an intent to injure* the . . . *property* of another") (emphasis added); § 6–11–20(b)(5) ("Oppression" includes "[s]ubjecting a person to . . . unjust hardship in conscious disregard of that person's rights"). The statute thereby authorizes punitive damages for the most serious kinds of misrepresentations, say, tricking the elderly out of their life savings, for much less serious conduct, such as the failure to disclose repainting a car, at issue here, and for a vast range of conduct in between.

Second, the Alabama courts, in this case, have applied the "factors" intended to constrain punitive damages awards in a way that belies that purpose. *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218 (Ala. 1989), sets forth seven factors that appellate courts use to determine whether or not a jury award was "grossly excessive" and which, in principle, might make up for the lack of significant constraint in the statute. But, as the Alabama courts have authoritatively interpreted them, and as their application in this case illustrates, they impose little actual constraint.

(a) *Green Oil* requires that a punitive damages award "bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred." *Id.*, at 223. But this standard does little to guide a determination of what counts as a "reasonable" relationship, as this case illustrates. The record evidence of past, present, or likely future harm consists of (a) $4,000 of harm to Dr. Gore's BMW; (b) 13 other similar Alabama instances; and (c) references to about 1,000 similar instances in other States. The Alabama Supreme Court, disregarding BMW's failure to make relevant objection to the out-of-state instances at trial (as was the court's right), held that the last mentioned, out-of-state instances did *not* count as relevant harm. It went on to find "a reasonable relationship" between the harm and the $2 million punitive damages award *without "consider[ing] those acts that occurred in other jurisdictions."* 646 So. 2d 619, 628 (1994) (emphasis added). For reasons explored by the majority in greater depth, see *ante,* at 574–586, the relationship between this award and the underlying conduct seems well beyond the bounds of the "reasonable." To find a "reasonable relationship" between purely economic harm totaling $56,000, without significant evidence of future repetition, and a punitive award of $2 million is to empty the "reasonable relationship" test of meaningful content. As thus construed, it does not set forth a legal standard that could have significantly constrained the discretion of Alabama factfinders.

(b) *Green Oil's* second factor is the "degree of reprehensibility" of the defendant's conduct. *Green Oil, supra,* at 223. Like the "reasonable relationship" test, this factor provides little guidance on how to relate culpability to the size of an award. The Alabama court, in considering this factor, found "reprehensible" that BMW followed a conscious policy of not disclosing repairs to new cars when the cost of repairs amounted to less than 3% of the car's value. Of course, *any* conscious policy of not disclosing a repair—where one knows the nondisclosure might cost the customer resale value—is "reprehensible" to *some* degree. But, for the reasons discussed by the majority, *ante,* at 575–580, I do not see how the Alabama courts could find conduct that (they assumed) caused $56,000 of relevant economic harm *especially* or *unusually* reprehensible enough to warrant $2 million in punitive damages, or a significant portion of that award. To find to the contrary, as the Alabama courts did, is not simply unreasonable; it is to make "reprehensibility" a concept without constraining force, *i. e.,* to deprive the concept of its constraining power to protect against serious and capricious deprivations.

(c) *Green Oil's* third factor requires "punitive damages" to "remove the profit" of the illegal activity and "be in excess of the profit, so that the defendant recognizes a loss." *Green Oil*, 539 So. 2d, at 223. This factor has the ability to limit awards to a fixed, rational amount. But as applied, that concept's potential was not realized, for the court did not limit the award to anywhere near the $56,000 in profits evidenced in the record. Given the record's description of the conduct and its prevalence, this factor could not justify much of the $2 million award.

(d) *Green Oil's* fourth factor is the "financial position" of the defendant. *Ibid.* Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives). See *TXO*, 509 U. S., at 462, and n. 28 (plurality opinion); *id.*, at 469 (KENNEDY, J., concurring in part and concurring in judgment); *Haslip*, 499 U. S., at 21–22; *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 300 (1989) (O'CONNOR, J., concurring in part and dissenting in part). This factor, however, is not necessarily intended to act as a significant *constraint* on punitive awards. Rather, it provides an open-ended basis for inflating awards when the defendant is wealthy, as this case may illustrate. That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as "reprehensibility," to constrain significantly an award that purports to punish a defendant's conduct.

(e) *Green Oil's* fifth factor is the "costs of litigation" and the State's desire "to encourage plaintiffs to bring wrongdoers to trial." 539 So. 2d, at 223. This standard provides meaningful constraint to the extent that the enhancement it authorized is linked to a fixed, ascertainable amount approximating actual costs, even when defined generously to reflect the contingent nature of plaintiffs' victories. But as this case shows, the factor cannot operate as a constraint when an award much in excess of costs is approved for other reasons. An additional aspect of the standard—the need to "encourage plaintiffs to bring wrongdoers to trial"—is a factor that does not constrain, but enhances, discretionary power—especially when unsupported by evidence of a *special* need to encourage litigation (which the Alabama courts here did not mention).

(f) *Green Oil*'s sixth factor is whether or not "criminal sanctions have been imposed on the defendant for his conduct." *Ibid.* This factor did not apply here.

(g) *Green Oil*'s seventh factor requires that "other civil actions" filed "against the same defendant, based on the same conduct," be considered in mitigation. *Id.*, at 224. That factor did not apply here.

Thus, the first, second, and third *Green Oil* factors, in principle, might sometimes act as constraints on arbitrary behavior. But *as the Alabama courts interpreted those standards in this case*, even taking those three factors together, they could not have significantly constrained the court system's ability to impose "grossly excessive" awards.

Third, the state courts neither referred to, nor made any effort to find, nor enunciated any other standard that either directly, or indirectly as background, might have supplied the constraining legal force that the statute and *Green Oil* standards (as interpreted here) lack. Dr. Gore did argue to the jury an economic theory based on the need to offset the totality of the harm that the defendant's conduct caused. Some theory of that general kind might have provided a significant constraint on arbitrary awards (at least where confined to the relevant harm-causing conduct, see *ante*, at 570–574). Some economists, for example, have argued for a standard that would deter illegal activity causing solely economic harm through the use of punitive damages awards that, as a whole, would take from a wrongdoer the total cost of the harm caused. See, *e. g.*, S. Shavell, Economic Analysis of Accident Law 162 (1987) ("If liability equals losses caused multiplied by . . . the inverse of the probability of suit, injurers will act optimally under liability rules despite the chance that they will escape suit"); Cooter, Punitive Damages for Deterrence: When and How Much, 40 Ala. L. Rev. 1143, 1146–1148 (1989). My understanding of the intuitive essence of some of those theories, which I put in crude form (leaving out various qualifications), is that they could permit juries to calculate punitive damages by making a rough estimate of global harm, dividing that estimate by a similarly rough estimate of the number of successful lawsuits that would likely be brought, and adding generous attorney's fees and other costs. Smaller damages would not sufficiently discourage firms from engaging in the harmful conduct, while larger damages would "over-deter" by leading potential defendants to spend more to prevent the activity that causes the economic harm, say, through employee training, than the cost of the harm itself. See Galligan, Augmented Awards: The Efficient Evolution of Punitive Damages, 51 La. L. Rev. 3, 17–20, 28–30 (1990). Larger damages might also "double count" by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.

The record before us, however, contains nothing suggesting that the Alabama Supreme Court, when determining the allowable award, applied *any* "economic" theory that might explain the $2 million recovery. Cf. *Browning-Ferris*, *supra*, at 300 (noting that the Constitution "does not incorporate the views of the Law and Economics School," nor does it " 'require the States to subscribe to any particular economic theory' ") (O'CONNOR, J., concurring in part and dissenting in part) (quoting *CTS Corp.* v. *Dynamics Corp. of America*, 481 U. S. 69, 92 (1987)). And courts properly tend to judge the rationality of judicial actions in terms of the reasons that were given, and the facts that were before the court, cf. *TXO*, 509 U. S., at 468 (KENNEDY, J., concurring in part and concurring in judgment), not those that might have been given on the basis of some conceivable set of facts (unlike the rationality of economic statutes enacted by legislatures subject to the public's control through the ballot box, see, *e. g., FCC* v. *Beach Communications, Inc.,* 508 U. S. 307, 315 (1993)). Therefore, reference to a constraining "economic" theory, which might have counseled more deferential review by this Court, is lacking in this case.

Fourth, I cannot find any community understanding or historic practice that this award might exemplify and which, therefore, would provide background standards constraining arbitrary behavior and excessive awards. A punitive damages award of $2 million for intentional misrepresentation causing $56,000 of harm is extraordinary by historical standards, and, as far as I am aware, finds no analogue until relatively recent times. *Amici* for Dr. Gore attempt to show that this is not true, pointing to various historical cases which, according to their calculations, represented roughly equivalent punitive awards for similarly culpable conduct. See Brief for James D. A. Boyle et al. as *Amici Curiae* 4–5 (hereinafter Legal Historians' Brief). Among others, they cite *Wilkes* v. *Wood,* Lofft 1, 98 Eng. Rep. 489 (C. P. 1763) (£1,000 said to be equivalent of $1.5 million, for warrantless search of papers); *Huckle* v. *Money,* 2 Wils. 205, 95 Eng. Rep. 768 (K. B. 1763) (£300, said to be $450,000, for 6-hour false imprisonment); *Hewlett* v. *Cruchley,* 5 Taunt. 277, 128 Eng. Rep. 696 (C. P. 1813) (£2,000, said to be $680,000, for malicious prosecution); *Merest* v. *Harvey,* 5 Taunt. 442, 128 Eng. Rep. 761 (C. P. 1814) (£500, said to be $165,000, for poaching). But *amici* apparently base their conversions on a mathematical assumption, namely, that inflation has progressed at a constant 3% rate of inflation. See Legal Historians' Brief 4. In fact, consistent, cumulative inflation is a modern phenomenon. See McCusker, How Much Is That in Real Money? A Historical Price Index for Use as a Deflator of Money Values in the Economy of the United States, 101 Proceedings of American Antiquarian Society 297, 310, 323–332 (1992). Estimates based on historical rates of valuation, while highly approximate, suggest that the ancient extraordinary awards are small compared to the $2 million here at issue, or other modern punitive damages figures. See Appendix to this opinion, *infra*, at 597–598 (suggesting that the modern equivalent of the awards in the above cases is something like $150,000, $45,000, $100,000, and $25,000, respectively). And, as the majority opinion makes clear, the record contains nothing to suggest that the extraordinary size of the award in this case is explained by the extraordinary wrongfulness of the defendant's behavior, measured by historical or community standards, rather than arbitrariness or caprice.

Fifth, there are no other legislative enactments here that classify awards and impose quantitative limits that would significantly cabin the fairly unbounded discretion created by the absence of constraining legal standards. Cf., *e. g.*, Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (Supp. 1996) (punitive damages generally limited to greater of double damages, or $200,000, except cap does not apply to suits arising from certain serious criminal acts enumerated in the statute); Conn. Gen. Stat. § 52–240b (1995) (punitive damages may not exceed double compensatory damages in product liability cases); Fla. Stat. § 768.73(1) (Supp. 1993) (punitive damages in certain actions limited to treble compensatory damages); Ga. Code Ann. § 51–12–5.1(g) (Supp. 1995) ($250,000 cap in certain actions).

The upshot is that the rules that purport to channel discretion in this kind of case, here did not do so in fact. That means that the award in this case was both (a) the product of a system of standards that did not significantly constrain a court's, and hence a jury's, discretion in making that award; and (b) grossly excessive in light of the State's legitimate punitive damages objectives.

The first of these reasons has special importance where courts review a jury-determined punitive damages award. That is because one cannot expect to direct jurors like legislators through the ballot box; nor can one expect those jurors to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law. Yet here Alabama expects jurors to act, at least a little, like legislators or judges, for it permits them, to a certain extent, to create public policy and to apply that policy, not to compensate a victim, but to achieve a policy-related objective outside the confines of the particular case.

To the extent that neither clear legal principles nor fairly obvious historical or community-based standards (defining, say, especially egregious behavior) significantly constrain punitive damages awards, is there not a substantial risk of outcomes so arbitrary that they become difficult to square with the Constitution's assurance, to every citizen, of the law's protection? The standards here, as authoritatively interpreted, in my view, make this threat real and not theoretical. And, in these unusual circumstances, where legal standards offer virtually no constraint, I believe that this lack of constraining standards warrants this Court's detailed examination of the award.

The second reason—the severe disproportionality between the award and the legitimate punitive damages objectives—reflects a judgment about a matter of degree. I recognize that it is often difficult to determine just when a punitive award exceeds an amount reasonably related to a State's legitimate interests, or when that excess is so great as to amount to a matter of constitutional concern. Yet whatever the difficulties of drawing a precise line, once we examine the award in this case, it is not difficult to say that this award lies on the line's far side. The severe lack of proportionality between the size of the award and the underlying punitive damages objectives shows that the award falls into the category of "gross excessiveness" set forth in this Court's prior cases.

These two reasons *taken together* overcome what would otherwise amount to a "strong presumption of validity." *TXO*, 509 U. S., at 457. And, for those two reasons, I conclude that the award in this unusual case violates the basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides.

APPENDIX TO OPINION OF BREYER, J.

Although I recognize that all estimates of historic rates of inflation are subject to dispute, including, I assume, the sources below, those sources suggest that the value of the 18th and 19th century judgments cited by *amici* is much less than the figures *amici* arrived at under their presumption of a constant 3% rate of inflation.

In 1763, £1 (Eng.) was worth £1.73 Pennsylvania currency. See U. S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Series Z–585, p. 1198 (Bicentennial ed. 1975). For the period 1766–1772, £1 (Penn.) was worth $45.99 (U. S. 1991). See McCusker, How Much Is That in Real Money? A Historical Price Index for Use as a Deflator of Money Values in the Economy of the United States, 101 American Antiquarian Society 297, 333 (1992). Thus, £1 (Eng. 1763) is worth about $79.56 (U. S. 1991). Accounting for the 12% inflation of the U. S. dollar between 1991 and 1995 (when *amici* filed their brief), see Economic Indicators, 104th Cong., 2d Sess., p. 23 (Feb. 1996), £1 (Eng. 1763) is worth about $89.11 (U. S. 1995).

Calculated another way, £1 (Eng. 1763) is worth about £72.84 (Eng. 1991). See McCusker, *supra,* at 312, 342, 350. And £1 (Eng. 1991) is worth $1.77 (U. S. 1991). See 78 Fed. Reserve Bulletin A68 (Feb. 1992). Thus, £1 (Eng. 1763) amounts to about $128.93 (U. S. 1991). Again, accounting for inflation between 1991 and 1995, this amounts to about $144.40 (U. S. 1995).

Thus, the above sources suggest that the £1,000 award in *Wilkes* in 1763 roughly amounts to between $89,110 and $144,440 today, not $1.5 million. And the £300 award in *Huckle* that same year would seem to be worth between $26,733 and $43,320 today, not $450,000.

For the period of the *Hewlett* and *Merest* decisions, £1 (Eng. 1813) is worth about £25.3 (Eng. 1991). See McCusker, *supra,* at 344, 350. Using the 1991 exchange rate, £1 (Eng. 1813) is worth about $44.78 (U. S. 1991). Accounting for inflation between 1991 and 1995, this amounts to about $50.16 (U. S. 1995).

Thus, the £2,000 and £500 awards in *Hewlett* and *Merest* would seem to be closer to $100,320 and $25,080, respectively, than to *amici's* estimates of $680,000 and $165,000.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Today we see the latest manifestation of this Court's recent and increasingly insistent "concern about punitive damages that 'run wild.'" *Pacific Mut. Life Ins. Co.* v. *Haslip,* 499 U. S. 1, 18 (1991). Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments.

In earlier cases that were the prelude to this decision, I set forth my view that a state trial procedure that commits the decision whether to impose punitive damages, and the amount, to the discretion of the jury, subject to some judicial review for "reasonableness," furnishes a defendant with all the process that is "due." See *TXO Production Corp.* v. *Alliance Resources Corp.,* 509 U. S. 443, 470 (1993) (SCALIA, J., concurring in judgment); *Haslip, supra,* at 25–28 (SCALIA, J., concurring in judgment); cf. *Honda Motor Co.* v. *Oberg,* 512 U. S. 415, 435–436 (1994) (SCALIA, J., concurring). I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against "unfairness"—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an "unreasonable" punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually *be* reasonable. See *TXO*, *supra*, at 471 (SCALIA, J., concurring in judgment).

This view, which adheres to the text of the Due *Process* Clause, has not prevailed in our punitive damages cases. See *TXO*, 509 U. S., at 453–462 (plurality opinion); *id.*, at 478–481 (O'CONNOR, J., dissenting); *Haslip*, *supra*, at 18. When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it *stare decisis* effect—indeed, I do not feel justified in doing so. See, *e. g.*, *Witte* v. *United States*, 515 U. S. 389, 406 (1995) (SCALIA, J., concurring in judgment); *Walton* v. *Arizona*, 497 U. S. 639, 673 (1990) (SCALIA, J., concurring in judgment in part and dissenting in part). Our punitive damages jurisprudence compels such a response. The Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be), and the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the "reasonableness" of the award in relation to the conduct for which it was assessed.

Because today's judgment represents the first instance of this Court's invalidation of a state-court punitive assessment as simply unreasonably large, I think it a proper occasion to discuss these points at some length.

I

The most significant aspects of today's decision—the identification of a "substantive due process" right against a "grossly excessive" award, and the concomitant assumption of ultimate authority to decide anew a matter of "reasonableness" resolved in lower court proceedings—are of course not new. *Haslip* and *TXO* revived the notion, moribund since its appearance in the first years of this century, that the measure of civil punishment poses a question of constitutional dimension to be answered by this Court. Neither of those cases, however, nor any of the precedents upon which they relied, actually took the step of declaring a punitive award unconstitutional simply because it was "too big."

At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved. See, *e. g., Barry* v. *Edmunds,* 116 U. S. 550, 565 (1886); *Missouri Pacific R. Co.* v. *Humes,* 115 U. S. 512, 521 (1885); *Day* v. *Woodworth,* 13 How. 363, 371 (1852). See generally *Haslip, supra,* at 25–27 (SCALIA, J., concurring in judgment). Today's decision, though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court. It reflects not merely, as the concurrence candidly acknowledges, "a judgment about a matter of degree," *ante,* at 596; but a judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination.

There is no precedential warrant for giving our judgment priority over the judgment of state courts and juries on this matter. The only support for the Court's position is to be found in a handful of errant federal cases, bunched within a few years of one other, which invented the notion that an unfairly severe civil sanction amounts to a violation of constitutional liberties. These were the decisions upon which the *TXO* plurality relied in pronouncing that the Due Process Clause "imposes substantive limits 'beyond which penalties may not go,'" 509 U. S., at 454 (quoting *Seaboard Air Line R. Co.* v. *Seegers,* 207 U. S. 73, 78 (1907)); see also 509 U. S., at 478–481 (O'CONNOR, J., dissenting); *Haslip, supra,* at 18. Although they are our precedents, they are themselves too shallowly rooted to justify the Court's recent undertaking. The only case relied upon in which the Court actually invalidated a civil sanction does not even support constitutional review for excessiveness, since it really concerned the validity, as a matter of *procedural* due process, of state legislation that imposed a significant penalty on a common carrier which lacked the means of determining the legality of its actions before the penalty was imposed. See *Southwestern Telegraph & Telephone Co.* v. *Danaher,* 238 U. S. 482, 489–491 (1915). The *amount* of the penalty was not a subject of independent scrutiny. As for the remaining cases, while the opinions do consider arguments that statutory penalties can, by reason of their excessiveness, violate due process, not a single one of these judgments invalidates a damages award. See *Seaboard, supra,* at 78–79; *Waters-Pierce Oil Co.* v. *Texas (No. 1),* 212 U. S. 86, 111–112 (1909); *Standard Oil Co. of Ind.* v. *Missouri,* 224 U. S. 270, 286, 290 (1912); *St. Louis, I. M. & S. R. Co.* v. *Williams,* 251 U. S. 63, 66–67 (1919).

More importantly, this latter group of cases—which again are the *sole* precedential foundation put forward for the rule of constitutional law espoused by today's Court—simply fabricated the "substantive due process" right at issue. *Seaboard* assigned no precedent to its bald assertion that the Constitution imposes "limits beyond which penalties may not go," 207 U. S., at 78. *Waters-Pierce* cited only *Coffey* v. *County of Harlan,* 204 U. S. 659 (1907), a case which inquired into the constitutionality of state *procedure, id.,* at 662–663. *Standard Oil* simply cited *Waters-Pierce,* and *St. Louis, I. M. & S. R. Co.* offered in addition to these cases only *Collins* v. *Johnston,* 237 U. S. 502 (1915), which said nothing to support the notion of a "substantive due process" right against excessive civil penalties, but to the contrary asserted that the prescribing and imposing of criminal punishment were "functions peculiarly belonging to the several States," *id.*, at 509–510. Thus, the only authority for the Court's position is simply not authoritative. These cases fall far short of what is needed to supplant this country's longstanding practice regarding exemplary awards, see, *e. g., Haslip,* 499 U. S., at 15–18; *id.*, at 25–28 (SCALIA, J., concurring in judgment).

II

One might understand the Court's eagerness to enter this field, rather than leave it with the state legislatures, if it had something useful to say. In fact, however, its opinion provides virtually no guidance to legislatures, and to state and federal courts, as to what a "constitutionally proper" level of punitive damages might be.

We are instructed at the outset of Part II of the Court's opinion—the beginning of its substantive analysis—that "the federal excessiveness inquiry . . . begins with an identification of the state interests that a punitive award is designed to serve." *Ante,* at 568. On first reading this, one is faced with the prospect that federal punitive damages law (the new field created by today's decision) will be beset by the sort of "interest analysis" that has laid waste the formerly comprehensible field of conflict of laws. The thought that each assessment of punitive damages, as to each offense, must be examined to determine the precise "state interests" pursued, is most unsettling. Moreover, if those "interests" are the most fundamental determinant of an award, one would think that due process would require the assessing jury to be *instructed* about them.

It appears, however (and I certainly hope), that all this is a false alarm. As Part II of the Court's opinion unfolds, it turns out to be directed, not to the question "How much punishment is too much?" but rather to the question "Which acts can be punished?" "Alabama does not have the power," the Court says, "to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents." *Ante,* at 572–573. That may be true, though only in the narrow sense that a person cannot be *held liable to be punished* on the basis of a lawful act. But if a person has been held subject to punishment because he committed an *un*lawful act, the *degree* of his punishment assuredly *can* be increased on the basis of any other conduct of his that displays his wickedness, unlawful or not. Criminal sentences can be computed, we have said, on the basis of "information concerning every aspect of a defendant's life," *Williams* v. *New York*, 337 U. S. 241, 250–252 (1949). The Court at one point seems to acknowledge this, observing that, although a sentencing court "[cannot] properly *punish* lawful conduct," it may in assessing the penalty "consider . . . lawful conduct that bears on the defendant's character." *Ante*, at 573, n. 19. That concession is quite incompatible, however, with the later assertion that, since "neither the jury nor the trial court was presented with evidence that any of BMW's out-of-state conduct was unlawful," the Alabama Supreme Court "therefore properly eschewed reliance on BMW's out-of-state conduct, . . . and based its remitted award solely on conduct that occurred within Alabama." *Ante*, at 573–574. Why could the Supreme Court of Alabama not consider lawful (but disreputable) conduct, both inside and outside Alabama, for the purpose of assessing just how bad an actor BMW was?

The Court follows up its statement that "Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred" with the statement: "Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." *Ante*, at 572–573. The Court provides us no citation of authority to support this proposition—other than the barely analogous cases cited earlier in the opinion, see *ante*, at 571–572—and I know of none.

These significant issues pronounced upon by the Court are not remotely presented for resolution in the present case. There is no basis for believing that Alabama has sought to control conduct elsewhere. The statutes at issue merely permit civil juries to treat conduct such as petitioner's as fraud, and authorize an award of appropriate punitive damages in the event the fraud is found to be "gross, oppressive, or malicious," Ala. Code § 6–11–20(b)(1) (1993). To be sure, respondent did invite the jury to consider out-of-state conduct in its calculation of damages, but any increase in the jury's initial award based on that consideration is not a component of the remitted judgment before us. As the Court several times recognizes, in computing the amount of the remitted award the Alabama Supreme Court—whether it was constitutionally required to or not—"expressly disclaimed any reliance on acts that occurred in other jurisdictions." *Ante,* at 567 (internal quotation marks omitted); see also *ante,* at 573–574.* Thus, the only question presented by this case is whether that award, limited to petitioner's Alabama conduct and viewed in light of the factors identified as properly informing the inquiry, is excessive. The Court's sweeping (and largely unsupported) statements regarding the relationship of punitive awards to lawful or unlawful out-of-state conduct are the purest dicta.

III

In Part III of its opinion, the Court identifies "[t]hree guideposts" that lead it to the conclusion that the award in this case is excessive: degree of reprehensibility, ratio between punitive award and plaintiff's actual harm, and legislative sanctions provided for comparable misconduct. *Ante*, at 574–585. The legal significance of these "guideposts" is nowhere explored, but their necessary effect is to establish federal standards governing the hitherto exclusively state law of damages. Apparently (though it is by no means clear) all three federal "guideposts" can be overridden if "necessary to deter future misconduct," *ante*, at 584—a loophole that will encourage state reviewing courts to uphold awards as necessary for the "adequat[e] protect[ion]" of state consumers, *ibid.* By effectively requiring state reviewing courts to concoct rationalizations—whether within the "guideposts" or through the loophole—to justify the intuitive punitive reactions of state juries, the Court accords neither category of institution the respect it deserves.

---

*The Alabama Supreme Court said:

"[W]e must conclude that the award of punitive damages was based in large part on conduct that happened in other jurisdictions. . . . Although evidence of similar acts in other jurisdictions is admissible as to the issue of 'pattern and practice' of such acts, . . . this jury could not use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages award. Such evidence may not be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrongful." 646 So. 2d 619, 627 (1994).

Of course it will not be easy for the States to comply with this new federal law of damages, no matter how willing they are to do so. In truth, the "guideposts" mark a road to nowhere; they provide no real guidance at all. As to "degree of reprehensibility" of the defendant's conduct, we learn that " 'nonviolent crimes are less serious than crimes marked by violence or the threat of violence,' " *ante*, at 576 (quoting *Solem* v. *Helm*, 463 U. S. 277, 292–293 (1983)), and that " 'trickery and deceit' " are "more reprehensible than negligence," *ante*, at 576. As to the ratio of punitive to compensatory damages, we are told that a " 'general concer[n] of reasonableness . . . enter[s] into the constitutional calculus,' " *ante*, at 583 (quoting *TXO*, 509 U. S., at 458)—though even "a breathtaking 500 to 1" will not necessarily do anything more than " 'raise a suspicious judicial eyebrow,' " *ante*, at 583 (quoting *TXO*, *supra*, at 481 (O'CONNOR, J., dissenting), an opinion which, when confronted with that "breathtaking" ratio, approved it). And as to legislative sanctions provided for comparable misconduct, they should be accorded " 'substantial deference,' " *ante*, at 583 (quoting *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 301 (1989) (O'CONNOR, J., concurring in part and dissenting in part)). One expects the Court to conclude: "To thine own self be true."

These crisscrossing platitudes yield no real answers in no real cases. And it must be noted that the Court nowhere says that these three "guideposts" are the *only* guideposts; indeed, it makes very clear that they are not—explaining away the earlier opinions that do not really follow these "guideposts" on the basis of *additional* factors, thereby "reiterat[ing] our rejection of a categorical approach." *Ante*, at 582. In other words, even these utter platitudes, if they should ever happen to produce an answer, may be overridden by other unnamed considerations. The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not "fair."

The Court distinguishes today's result from *Haslip* and *TXO* partly on the ground that "the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*." *Ante*, at 579. This seemingly rejects the findings necessarily made by the jury—that petitioner had committed a fraud that was "gross, oppressive, or malicious," Ala. Code §6–11–20(b)(1) (1993). Perhaps that rejection is intentional; the Court does not say.

The relationship between judicial application of the new "guideposts" and jury findings poses a real problem for the Court, since as a matter of logic there is no more justification for ignoring the jury's determination as to *how* reprehensible petitioner's conduct was (*i. e.*, how much it deserves to be punished), than there is for ignoring its determination that it was reprehensible *at all* (*i. e.*, that the wrong was willful and punitive damages are therefore recoverable). That the issue has been framed in terms of a constitutional right against unreasonably *excessive* awards should not obscure the fact that the logical and necessary consequence of the Court's approach is the recognition of a constitutional right against unreasonably *imposed* awards as well. The elevation of "fairness" in punishment to a principle of "substantive due process" means that every punitive award unreasonably imposed is unconstitutional; such an award is by definition excessive, since it attaches a penalty to conduct undeserving of punishment. Indeed, if the Court is correct, it must be that every claim that a state jury's award of *compensatory* damages is "unreasonable" (because not supported by the evidence) amounts to an assertion of constitutional injury. See *TXO, supra,* at 471 (SCALIA, J., concurring in judgment). And the same would be true for determinations of liability. By today's logic, *every* dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review in this Court. That is a stupefying proposition.

For the foregoing reasons, I respectfully dissent.

JUSTICE GINSBURG, with whom THE CHIEF JUSTICE joins, dissenting.

The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States' domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas. The Alabama Supreme Court, in this case, endeavored to follow this Court's prior instructions; and, more recently, Alabama's highest court has installed further controls on awards of punitive damages (see *infra,* at 613–614, n. 6). I would therefore leave the state court's judgment undisturbed, and resist unnecessary intrusion into an area dominantly of state concern.

I

The respect due the Alabama Supreme Court requires that we strip from this case a false issue: No impermissible "extraterritoriality" infects the judgment before us; the excessiveness of the award is the sole issue genuinely presented. The Court ultimately so recognizes, see *ante,* at 573–574, but further clarification is in order.

Dr. Gore's experience was not unprecedented among customers who bought BMW vehicles sold as flawless and brand-new. In addition to his own encounter, Gore showed, through paint repair orders introduced at trial, that on 983 other occasions since 1983, BMW had shipped new vehicles to dealers without disclosing paint repairs costing at least $300, Tr. 585–586; at least 14 of the repainted vehicles, the evidence also showed, were sold as new and undamaged to consumers in Alabama. 646 So. 2d 619, 623 (Ala. 1994). Sales nationwide, Alabama's Supreme Court said, were admissible "as to the issue of a 'pattern and practice' of such acts." *Id.*, at 627. There was "no error," the court reiterated, "in the admission of the evidence that showed how pervasive the nondisclosure policy was and the intent behind BMW NA's adoption of it." *Id.*, at 628. That determination comports with this Court's expositions. See *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 462, and n. 28 (1993) (characterizing as "well-settled" the admissibility of "evidence of [defendant's] alleged wrongdoing in other parts of the country" and of defendant's "wealth"); see also Brief for Petitioner 22 (recognizing that similar acts, out-of-state, traditionally have been considered relevant "for the limited purpose of determining that the conduct before the [c]ourt was reprehensible because it was part of a pattern rather than an isolated incident").

Alabama's highest court next declared that the

> "jury could not use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages award. Such evidence may not be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrong-

> ful." 646 So. 2d, at 627 (emphasis in original) (footnote omitted).

Because the Alabama Supreme Court provided this clear statement of the State's law, the multiplier problem encountered in Gore's case is not likely to occur again. Now, as a matter of Alabama law, it is plainly impermissible to assess punitive damages by multiplication based on out-of-state events not shown to be unlawful. See, *e. g., Independent Life and Accident Ins. Co.* v. *Harrington,* 658 So. 2d 892, 902–903 (Ala. 1994) (under *BMW* v. *Gore,* trial court erred in relying on defendant insurance company's out-of-state insurance policies in determining harm caused by defendant's unlawful actions).

No Alabama authority, it bears emphasis—no statute, judicial decision, or trial judge instruction—ever countenanced the jury's multiplication of the $4,000 diminution in value estimated for each refinished car by the number of such cars (approximately 1,000) shown to have been sold nationwide. The sole prompt to the jury to use nationwide sales as a multiplier came from Gore's lawyer during summation. App. 31, Tr. 812–813. Notably, counsel for BMW failed to object to Gore's multiplication suggestion, even though BMW's counsel interrupted to make unrelated objections four other times during Gore's closing statement. Tr. 810–811, 854–855, 858, 870–871. Nor did BMW's counsel request a charge instructing the jury not to consider out-of-state sales in calculating the punitive damages award. See Record 513–529 (listing all charges requested by counsel).

Following the verdict, BMW's counsel challenged the *admission* of the paint repair orders, but not, alternately, the jury's apparent use of the orders in a multiplication exercise. Curiously, during postverdict argument, BMW's counsel urged that if the repair orders were indeed admissible, then Gore would have a "full right" to suggest a multiplier-based disgorgement. Tr. 932.

In brief, Gore's case is idiosyncratic. The jury's improper multiplication, tardily featured by petitioner, is unlikely to recur in Alabama and does not call for error correction by this Court.

Because the jury apparently (and erroneously) had used acts in other States as a multiplier to arrive at a $4 million sum for punitive damages, the Alabama Supreme Court itself determined " 'the maximum amount that a properly functioning jury could have awarded.' " 646 So. 2d, at 630 (Houston, J., concurring specially) (quoting *Big B, Inc.* v. *Cottingham*, 634 So. 2d 999, 1006 (Ala. 1993)). The *per curiam* opinion emphasized that in arriving at $2 million as "the *amount of punitive damages* to be awarded in this case, [the court did] not consider those acts that occurred in other jurisdictions." 646 So. 2d, at 628 (emphasis in original). As this Court recognizes, the Alabama high court "properly eschewed reliance on BMW's out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama." *Ante*, at 573–574 (citation omitted). In sum, the Alabama Supreme Court left standing the jury's decision that the facts warranted *an award* of punitive damages—a determination not contested in this Court—and the state court concluded that, considering only acts in Alabama, $2 million was "a constitutionally reasonable punitive damages award." 646 So. 2d, at 629.

II

A

Alabama's Supreme Court reports that it "thoroughly and painstakingly" reviewed the jury's award, *ibid.*, according to principles set out in its own pathmarking decisions and in this Court's opinions in *TXO* and *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 21 (1991). 646 So. 2d, at 621. The Alabama court said it gave weight to several factors, including BMW's deliberate ("reprehensible") presentation of refinished cars as new and undamaged, without disclosing that the value of those cars had been reduced by an estimated

10%,[1] the financial position of the defendant, and the costs of litigation. *Id.*, at 625–626. These standards, we previously held, "impos[e] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *Haslip*, 499 U. S., at 22; see also *TXO*, 509 U. S., at 462, n. 28. Alabama's highest court could have displayed its labor pains more visibly,[2] but its judgment is nonetheless entitled to a presumption of legitimacy. See *Rowan* v. *Runnels*, 5 How. 134, 139 (1847) ("[T]his court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.").

We accept, of course, that Alabama's Supreme Court applied the State's own law correctly. Under that law, the State's objectives—"punishment and deterrence"—guide punitive damages awards. See *Birmingham* v. *Benson*, 631 So. 2d 902, 904 (Ala. 1994). Nor should we be quick to find a constitutional infirmity when the highest state court endeavored a corrective for one counsel's slip and the other's oversight—counsel for plaintiff's excess in summation, unobjected to by counsel for defendant, see *supra*, at 609—and when the state court did so intending to follow the process approved in our *Haslip* and *TXO* decisions.

B

The Court finds Alabama's $2 million award not simply excessive, but grossly so, and therefore unconstitutional.

---

[1] According to trial testimony, in late May 1992, BMW began redirecting refinished cars out of Alabama and two other States. Tr. 964. The jury returned its verdict in favor of Gore on June 12, 1992. Five days later, BMW changed its national policy to one of full disclosure. *Id.*, at 1026.

[2] See, *e. g.*, Brief for Law and Economics Scholars et al. as *Amici Curiae* 6–28 (economic analysis demonstrates that Alabama Supreme Court's judgment was not unreasonable); W. Landes & R. Posner, Economic Structure of Tort Law 160–163 (1987) (economic model for assessing propriety of punitive damages in certain tort cases).

The decision leads us further into territory traditionally within the States' domain,[3] and commits the Court, now and again, to correct "misapplication of a properly stated rule of law." But cf. this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").[4] The Court is not well equipped

---

[3] See *ante*, at 568 ("In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."); *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 278 (1989) (In any "lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law."); *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 255 (1984) ("Punitive damages have long been a part of traditional state tort law.").

[4] Petitioner invites the Court to address the question of multiple punitive damages awards stemming from the same alleged misconduct. The Court does not take up the invitation, and rightly so, in my judgment, for this case does not present the issue. For three reasons, the question of multiple awards is hypothetical, not real, in Gore's case. First, the punitive damages award in favor of Gore is the only such award yet entered against BMW on account of its nondisclosure policy.

Second, BMW did not raise the issue of multiple punitives below. Indeed, in its reply brief before the Alabama Supreme Court, BMW stated: "Gore confuses our point about fairness among plaintiffs. He treats this point as a premature 'multiple punitive damages' argument. But, contrary to Gore's contention, we are not asking this Court to hold, as a matter of law, that a 'constitutional violation occurs when a defendant is subjected to punitive damages in two separate cases.'" Reply Brief for Appellant in Nos. 1920324, 1920325 (Ala. Sup. Ct.), p. 48 (internal citations omitted).

Third, if BMW had already suffered a punitive damages judgment in connection with its nondisclosure policy, Alabama's highest court presumably would have taken that fact into consideration. In reviewing punitive damages awards attacked as excessive, the Alabama Supreme Court considers whether "there have been other civil actions against the same defendant, based on the same conduct." 646 So. 2d 619, 624 (1994) (quoting *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 224 (Ala. 1989)). If so, "this for this mission. Tellingly, the Court repeats that it brings to the task no "mathematical formula," *ante*, at 582, no "categorical approach," *ibid.*, no "bright line," *ante*, at 585. It has only a vague concept of substantive due process, a "raised eyebrow" test, see *ante*, at 583, as its ultimate guide.[5]

In contrast to habeas corpus review under 28 U. S. C. § 2254, the Court will work at this business alone. It will not be aided by the federal district courts and courts of appeals. It will be the *only* federal court policing the area. The Court's readiness to superintend state-court punitive damages awards is all the more puzzling in view of the Court's longstanding reluctance to countenance review, even by courts of appeals, of the size of verdicts returned by juries in federal district court proceedings. See generally 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2820 (2d ed. 1995). And the reexamination prominent in state courts[6] and in legislative arenas, see Appendix,

---

should be taken into account in mitigation of the punitive damages award." 646 So. 2d, at 624. The Alabama court accordingly observed that Gore's counsel had filed 24 other actions against BMW in Alabama and Georgia, but that no other punitive damages award had so far resulted. *Id.*, at 626.

[5] JUSTICE BREYER's concurring opinion offers nothing more solid. Under *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1 (1991), he acknowledges, Alabama's standards for punitive damages, standing alone, do not violate due process. *Ante*, at 588. But they "invit[e] the kind of scrutiny the Court has given the particular verdict before us." *Ibid.* Pursuing that invitation, JUSTICE BREYER concludes that, matching the particular facts of this case to Alabama's "legitimate punitive damages objectives," *ante*, at 596, the award was "'gross[ly] excessiv[e],'" *ante*, at 597. The exercise is engaging, but ultimately tells us only this: too big will be judged unfair. What is the Court's measure of too big? Not a cap of the kind a legislature could order, or a mathematical test this Court can divine and impose. Too big is, in the end, the amount at which five Members of the Court bridle.

[6] See, *e. g.*, *Distinctive Printing and Packaging Co.* v. *Cox*, 232 Neb. 846, 857, 443 N. W. 2d 566, 574 (1989) *(per curiam)* ("[P]unitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5, and thus are not allowed in this jurisdiction."); *Santana* v. *Registrars of Voters of Worcester*, 398 Mass. 862, 502 N. E. 2d 132 (1986) (punitive damages are not permitted, unless expressly authorized by statute); *Fisher Properties, Inc.* v.

infra this page, serves to underscore why the Court's enterprise is undue.

For the reasons stated, I dissent from this Court's disturbance of the judgment the Alabama Supreme Court has made.

APPENDIX TO OPINION OF GINSBURG, J.

STATE LEGISLATIVE ACTIVITY REGARDING PUNITIVE DAMAGES

State legislatures have in the hopper or have enacted a variety of measures to curtail awards of punitive damages. At least one state legislature has prohibited punitive damages altogether, unless explicitly provided by statute. See N. H. Rev. Stat. Ann. § 507:16 (1994). We set out in this appendix some of the several controls enacted or under consideration in the States. The measures surveyed are: (1) caps on awards; (2) provisions for payment of sums to state agencies rather than to plaintiffs; and (3) mandatory bifurcated trials with separate proceedings for punitive damages determinations.

Arden-Mayfair, Inc., 106 Wash. 2d 826, 852, 726 P. 2d 8, 23 (1986) (en banc) (same).

In *Life Ins. Co. of Georgia* v. *Johnson*, No. 1940357 (Nov. 17, 1995), the Alabama Supreme Court revised the State's regime for assessments of punitive damages. Henceforth, trials will be bifurcated. Initially, juries will be instructed to determine liability and the amount of compensatory damages, if any; also, the jury is to return a special verdict on the question whether a punitive damages award is warranted. If the jury answers yes to the punitive damages question, the trial will be resumed for the presentation of evidence and instructions relevant to the amount appropriate to award as punitive damages. After postverdict trial court review and subsequent appellate review, the amount of the final punitive damages judgment will be paid into the trial court. The trial court will then order payment of litigation expenses, including the plaintiff's attorney's fees, and instruct the clerk to divide the remainder equally between the plaintiff and the State General Fund. The provision for payment to the State General Fund is applicable to all judgments not yet satisfied, and therefore would apply to the judgment in Gore's case.

I. CAPS ON PUNITIVE DAMAGES AWARDS

- *Colorado*—Colo. Rev. Stat. §§13–21–102(1)(a) and (3) (1987) (as a main rule, caps punitive damages at amount of actual damages).
- *Connecticut*—Conn. Gen. Stat. §52–240b (1995) (caps punitive damages at twice compensatory damages in products liability cases).
- *Delaware*—H. R. 237, 138th Gen. Ass. (introduced May 17, 1995) (would cap punitive damages at greater of three times compensatory damages, or $250,000).
- *Florida*—Fla. Stat. §§768.73(1)(a) and (b) (Supp. 1992) (in general, caps punitive damages at three times compensatory damages).
- *Georgia*—Ga. Code Ann. §51–12–5.1 (Supp. 1995) (caps punitive damages at $250,000 in some tort actions; prohibits multiple awards stemming from the same predicate conduct in products liability actions).
- *Illinois*—H. 20, 89th Gen. Ass. 1995–1996 Reg. Sess. (enacted Mar. 9, 1995) (caps punitive damages at three times economic damages).
- *Indiana*—H. 1741, 109th Reg. Sess. (enacted Apr. 26, 1995) (caps punitive damages at greater of three times compensatory damages, or $50,000).
- *Kansas*—Kan. Stat. Ann. §§60–3701(e) and (f) (1994) (in general, caps punitive damages at lesser of defendant's annual gross income, or $5 million).
- *Maryland*—S. 187, 1995 Leg. Sess. (introduced Jan. 27, 1995) (in general, would cap punitive damages at four times compensatory damages).
- *Minnesota*—S. 489, 79th Leg. Sess., 1995 Reg. Sess. (introduced Feb. 16, 1995) (would require reasonable relationship between compensatory and punitive damages).
- *Nevada*—Nev. Rev. Stat. §42.005(1) (1993) (caps punitive damages at three times compensatory damages if compensatory damages equal $100,000 or more, and at $300,000 if the compensatory damages are less than $100,000).

- *New Jersey*—S. 1496, 206th Leg., 2d Ann. Sess. (1995) (caps punitive damages at greater of five times compensatory damages, or $350,000, in certain tort cases).
- *North Dakota*—N. D. Cent. Code § 32–03.2–11(4) (Supp. 1995) (caps punitive damages at greater of two times compensatory damages, or $250,000).
- *Oklahoma*—Okla. Stat., Tit. 23, §§ 9.1(B)–(D) (Supp. 1996) (caps punitive damages at greater of $100,000, or actual damages, if jury finds defendant guilty of reckless disregard; and at greatest of $500,000, twice actual damages, or the benefit accruing to defendant from the injury-causing conduct, if jury finds that defendant has acted intentionally and maliciously).
- *Texas*—S. 25, 74th Reg. Sess. (enacted Apr. 20, 1995) (caps punitive damages at twice economic damages, plus up to $750,000 additional noneconomic damages).
- *Virginia*—Va. Code Ann. § 8.01–38.1 (1992) (caps punitive damages at $350,000).

II. ALLOCATION OF PUNITIVE DAMAGES TO STATE AGENCIES

- *Arizona*—H. R. 2279, 42d Leg., 1st Reg. Sess. (introduced Jan. 12, 1995) (would allocate punitive damages to a victims' assistance fund, in specified circumstances).
- *Florida*—Fla. Stat. §§ 768.73(2)(a)–(b) (Supp. 1992) (allocates 35% of punitive damages to General Revenue Fund or Public Medical Assistance Trust Fund); see *Gordon* v. *State*, 585 So. 2d 1033, 1035–1038 (Fla. App. 1991), aff'd, 608 So. 2d 800 (Fla. 1992) (upholding provision against due process challenge).
- *Georgia*—Ga. Code Ann. § 51–12–5.1(e)(2) (Supp. 1995) (allocates 75% of punitive damages, less a proportionate part of litigation costs, including counsel fees, to state treasury); see *Mack Trucks, Inc.* v. *Conkle*, 263 Ga. 539, 540–543, 436 S. E. 2d 635, 637–639 (Ga. 1993) (upholding provision against constitutional challenge).

- *Illinois*—Ill. Comp. Stat., ch. 735, § 5/2–1207 (1994) (permits court to apportion punitive damages among plaintiff, plaintiff's attorney, and Illinois Department of Rehabilitation Services).
- *Indiana*—H. 1741, 109th Reg. Sess. (enacted Apr. 26, 1995) (subject to statutory exceptions, allocates 75% of punitive damages to a compensation fund for violent crime victims).
- *Iowa*—Iowa Code § 668A.1(2)(b) (1987) (in described circumstances, allocates 75% of punitive damages, after payment of costs and counsel fees, to a civil reparations trust fund); see *Shepherd Components, Inc.* v. *Brice Petrides-Donohue & Assoc., Inc.*, 473 N. W. 2d 612, 619 (Iowa 1991) (upholding provision against constitutional challenge).
- *Kansas*—Kan. Stat. Ann. § 60–3402(e) (1994) (allocates 50% of punitive damages in medical malpractice cases to state treasury).
- *Missouri*—Mo. Rev. Stat. § 537.675 (1994) (allocates 50% of punitive damages, after payment of expenses and counsel fees, to Tort Victims' Compensation Fund).
- *Montana*—H. 71, 54th Leg. Sess. (introduced Jan. 2, 1995) (would allocate 48% of punitive damages to state university system and 12% to school for the deaf and blind).
- *New Jersey*—S. 291, 206th Leg., 1994–1995 1st Reg. Sess. (introduced Jan. 18, 1994); A. 148, 206th Leg., 1994–1995 1st Reg. Sess. (introduced Jan. 11, 1994) (would allocate 75% of punitive damages to New Jersey Health Care Trust Fund).
- *New Mexico*—H. 1017, 42d Leg., 1st Sess. (introduced Feb. 16, 1995) (would allocate punitive damages to Low-Income Attorney Services Fund).
- *Oregon*—S. 482, 68th Leg. Ass. (enacted July 19, 1995) (amending Ore. Rev. Stat. §§ 18.540 and 30.925, and repealing Ore. Rev. Stat. § 41.315) (allocates 60% of punitive damages to Criminal Injuries Compensation Account).

- *Utah*—Utah Code Ann. § 78–18–1(3) (1992) (allocates 50% of punitive damages in excess of $20,000 to state treasury).

III. MANDATORY BIFURCATION OF LIABILITY AND PUNITIVE DAMAGES DETERMINATIONS

- *California*—Cal. Civ. Code Ann. § 3295(d) (West Supp. 1995) (requires bifurcation, on application of defendant, of liability and damages phases of trials in which punitive damages are requested).
- *Delaware*—H. R. 237, 138th Gen. Ass. (introduced May 17, 1995) (would require, at request of any party, a separate proceeding for determination of punitive damages).
- *Georgia*—Ga. Code Ann. § 51–12–5.1(d) (Supp. 1995) (in all cases in which punitive damages are claimed, liability for punitive damages is tried first, then amount of punitive damages).
- *Illinois*—H. 20, 89th Gen. Ass., 1995–1996 Reg. Sess. (enacted Mar. 9, 1995) (mandates, upon defendant's request, separate proceeding for determination of punitive damages).
- *Kansas*—Kan. Stat. Ann. §§ 60–3701(a) and (b) (1994) (trier of fact determines defendant's liability for punitive damages, then court determines amount of such damages).
- *Missouri*—Mo. Rev. Stat. §§ 510.263(1) and (3) (1994) (mandates bifurcated proceedings, on request of any party, for jury to determine first whether defendant is liable for punitive damages, then amount of punitive damages).
- *Montana*—Mont. Code Ann. § 27–1–221(7) (1995) (upon finding defendant liable for punitive damages, jury determines the amount in separate proceeding).
- *Nevada*—Nev. Rev. Stat. § 42.005(3) (1993) (if jury determines that punitive damages will be awarded, jury then determines amount in separate proceeding).
- *New Jersey*—N. J. Stat. Ann. §§ 2A:58C–5(b) and (d) (West 1987) (mandates separate proceedings for determination of compensatory and punitive damages).

- *North Dakota*—N. D. Cent. Code § 32–03.2–11(2) (Supp. 1995) (upon request of either party, trier of fact determines whether compensatory damages will be awarded before determining punitive damages liability and amount).
- *Oklahoma*—Okla. Stat., Tit. 23, §§ 9.1(B)–(D) (Supp. 1995–1996) (requires separate jury proceedings for punitive damages); S. 443, 45th Leg., 1st Reg. Sess. (introduced Jan. 31, 1995) (would require courts to strike requests for punitive damages before trial, unless plaintiff presents *prima facie* evidence at least 30 days before trial to sustain such damages; provide for bifurcated jury trial on request of defendant; and permit punitive damages only if compensatory damages are awarded).
- *Virginia*—H. 1070, 1994–1995 Reg. Sess. (introduced Jan. 25, 1994) (would require separate proceedings in which court determines that punitive damages are appropriate and trier of fact determines amount of punitive damages).

ROMER, GOVERNOR OF COLORADO, ET AL. *v.* EVANS ET AL.

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 94–1039. Argued October 10, 1995—Decided May 20, 1996

After various Colorado municipalities passed ordinances banning discrimination based on sexual orientation in housing, employment, education, public accommodations, health and welfare services, and other transactions and activities, Colorado voters adopted by statewide referendum "Amendment 2" to the State Constitution, which precludes all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Respondents, who include aggrieved homosexuals and municipalities, commenced this litigation in state court against petitioner state parties to declare Amendment 2 invalid and enjoin its enforcement. The trial court's grant of a preliminary injunction was sustained by the Colorado Supreme Court, which held that Amendment 2 was subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process. On remand, the trial court found that the amendment failed to satisfy strict scrutiny. It enjoined Amendment 2's enforcement, and the State Supreme Court affirmed.

Held: Amendment 2 violates the Equal Protection Clause. Pp. 626–636.

(a) The State's principal argument that Amendment 2 puts gays and lesbians in the same position as all other persons by denying them special rights is rejected as implausible. The extent of the change in legal status effected by this law is evident from the authoritative construction of Colorado's Supreme Court—which establishes that the amendment's immediate effect is to repeal all existing statutes, regulations, ordinances, and policies of state and local entities barring discrimination based on sexual orientation, and that its ultimate effect is to prohibit any governmental entity from adopting similar, or more protective, measures in the future absent state constitutional amendment—and from a review of the terms, structure, and operation of the ordinances that would be repealed and prohibited by Amendment 2. Even if, as the State contends, homosexuals can find protection in laws and policies of general application, Amendment 2 goes well beyond merely depriving them of special rights. It imposes a broad disability upon those persons alone, forbidding them, but no others, to seek specific legal protection from injuries caused by discrimination in a wide range of public and private transactions. Pp. 626–631.

(b) In order to reconcile the Fourteenth Amendment's promise that no person shall be denied equal protection with the practical reality that most legislation classifies for one purpose or another, the Court has stated that it will uphold a law that neither burdens a fundamental right nor targets a suspect class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end. See, *e. g., Heller* v. *Doe,* 509 U. S. 312, 319–320. Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment is at once too narrow and too broad, identifying persons by a single trait and then denying them the possibility of protection across the board. This disqualification of a class of persons from the right to obtain specific protection from the law is unprecedented and is itself a denial of equal protection in the most literal sense. Second, the sheer breadth of Amendment 2, which makes a general announcement that gays and lesbians shall not have any particular protections from the law, is so far removed from the reasons offered for it, *i. e.,* respect for other citizens' freedom of association, particularly landlords or employers who have personal or religious objections to homosexuality, and the State's interest in conserving resources to fight discrimination against other groups, that the amendment cannot be explained by reference to those reasons; the amendment raises the inevitable inference that it is born of animosity toward the class that it affects. Amendment 2 cannot be said to be directed to an identifiable legitimate purpose or discrete objective. It is a status-based classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. Pp. 631–636.

882 P. 2d 1335, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post,* p. 636.

Timothy M. Tymkovich, Solicitor General of Colorado, argued the cause for petitioners. With him on the briefs were *Gale A. Norton,* Attorney General, *Stephen K. ErkenBrack,* Chief Deputy Attorney General, *John Daniel Dailey* and *Paul Farley,* Deputy Attorneys General, and *Rex E. Lee* and *Carter G. Phillips,* Special Assistant Attorneys General.

Jean E. Dubofsky argued the cause for respondents. With her on the brief for respondents Evans et al. were *Rod-*

erick M. Hills, Jr., Matthew Coles, Steven R. Shapiro, Clyde J. Wadsworth, Suzanne B. Goldberg, Jeanne Winer, Gregory A. Eurich, David H. Miller, Darlene M. Ebert, Joseph N. de Raismes III, and *Walter A. Smith, Jr.* *John P. Worcester* and *Edward M. Caswall* filed a brief for respondents City of Aspen et al.*

---

*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Charles J. Cooper,* and by the Attorneys General for their respective States as follows: *Jeff Sessions* of Alabama, *Daniel E. Lungren* of California, *Alan G. Lance* of Idaho, *Don Stenberg* of Nebraska, *Charles Molony Condon* of South Carolina, *Mark Barnett* of South Dakota, and *James S. Gilmore III* of Virginia; for the American Center for Law and Justice Family Life Project by *Jay Alan Sekulow* and *Keith A. Fournier;* for the Christian Legal Society et al. by *Steven T. McFarland, Samuel B. Casey, Gregory S. Baylor,* and *John K. Hulston Hall;* for Colorado for Family Values by *Robert K. Skolrood;* for Concerned Women for America, Inc., by *David J. Myers* and *Wendell R. Bird;* for Equal Rights, Not Special Rights, Inc., by *Michael A. Carvin, William L. McGrath,* and *Robert H. Bork;* for the Family Research Council by *Melissa Wells-Petry;* for the Pacific Legal Foundation by *Anthony T. Caso* and *Deborah J. La Fetra;* and for the Oregon Citizens Alliance et al. by *Lawrence J. Hall.*

Briefs of *amici curiae* urging affirmance were filed for the State of Oregon et al. by *Theodore R. Kulongoski,* Attorney General of Oregon, *Thomas A. Balmer,* Deputy Attorney General, *Virginia L. Linder,* Solicitor General, *Michael D. Reynolds,* Assistant Solicitor General, and *Rives Kistler,* Assistant Attorney General, *Thomas J. Miller,* Attorney General of Iowa, *J. Joseph Curran, Jr.,* Attorney General of Maryland, *Scott Harshbarger,* Attorney General of Massachusetts, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Frankie Sue Del Papa,* Attorney General of Nevada, *Christine O. Gregoire,* Attorney General of Washington, and *Garland Pinkston, Jr.,* Acting Corporation Counsel of the District of Columbia; for the City of Atlanta et al. by *Louise H. Renne, Dennis Aftergut, Burk E. Delventhal, Julia M. C. Friedlander, Mary Carole Cooney, Robin Joy Shahar, Neal M. Janey, Stephen H. Clark, James K. Hahn, David I. Schulman, Eunice Gibson, Paul A. Crotty, Leonard A. Kerner, Jeffrey L. Rogers, Linda Meng, Janet E. Halley, Mark H. Sidran, Henry W. Underhill, Jr.,* and *Susan S. Sher;* for Affirmation: United Methodists for Gay, Lesbian and Bisexual Concerns et al. by *Celeste McCollough;* for the American Bar Association by *George E. Bushnell, Jr.;* for the American Association on Mental Retardation et al. by *James W. Ellis* and *Maureen A. Sanders;* for The American Federation of State, County and

JUSTICE KENNEDY delivered the opinion of the Court.

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

I

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as "Amendment 2," its designation when submitted to the voters. The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder and the city and County of Denver each had

---

Municipal Employees, AFL–CIO, by *John C. Dempsey* and *Larry P. Weinberg;* for the American Friends Service Committee et al. by *Stark Ritchie;* for the American Psychological Association et al. by *Paul M. Smith, James L. McHugh, Jr.,* and *Richard G. Taranto;* for the Asian American Legal Defense and Education Fund et al. by *Eben Moglen* and *Pamela S. Karlan;* for the Colorado Bar Association et al. by *Stephen V. Bomse, Martha Minow,* and *Frances A. Koncilja;* for the Gay and Lesbian Lawyers of Philadelphia by *Cletus P. Lyman;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Eric Schnapper, Elaine R. Jones, Theodore M. Shaw, Antonia Hernandez, Judith L. Lichtman,* and *Donna R. Lenhoff;* for the National Bar Association by *J. Clay Smith, Jr.;* for the National Education Association et al. by *Robert H. Chanin* and *John M. West;* for James E. Andrews by *Eric J. Graninger;* and for Laurence H. Tribe et al. by *Mr. Tribe, pro se, John Hart Ely, pro se, Philip B. Kurland, pro se,* and *Kathleen M. Sullivan, pro se.*

Chai R. Feldblum filed a brief for the Human Rights Campaign Fund et al. as *amici curiae.*

enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services. Denver Rev. Municipal Code, Art. IV, §§ 28–91 to 28–116 (1991); Aspen Municipal Code § 13–98 (1977); Boulder Rev. Code §§ 12–1–1 to 12–1–11 (1987). What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. See Boulder Rev. Code § 12–1–1 (defining "sexual orientation" as "the choice of sexual partners, i. e., bisexual, homosexual or heterosexual"); Denver Rev. Municipal Code, Art. IV, § 28–92 (defining "sexual orientation" as "[t]he status of an individual as to his or her heterosexuality, homosexuality or bisexuality"). Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Colo. Const., Art. II, § 30b.

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

> "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing." *Ibid.*

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. Among the plaintiffs (respondents here) were homosexual persons, some of them government employees. They alleged that enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation. Other plaintiffs (also respondents here) included the three municipalities whose ordinances we have cited and certain other governmental entities which had acted earlier to protect homosexuals from discrimination but would be prevented by Amendment 2 from continuing to do so. Although Governor Romer had been on record opposing the adoption of Amendment 2, he was named in his official capacity as a defendant, together with the Colorado Attorney General and the State of Colorado.

The trial court granted a preliminary injunction to stay enforcement of Amendment 2, and an appeal was taken to the Supreme Court of Colorado. Sustaining the interim injunction and remanding the case for further proceedings, the State Supreme Court held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process. *Evans* v. *Romer,* 854 P. 2d 1270 (Colo. 1993) *(Evans I).* To reach this conclusion, the state court relied on our voting rights cases, *e. g., Reynolds* v. *Sims,* 377 U. S. 533 (1964); *Carrington* v. *Rash,* 380 U. S. 89 (1965); *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663 (1966); *Williams* v. *Rhodes,* 393 U. S. 23 (1968), and on our precedents involving discriminatory restructuring of governmental decisionmaking, see, *e. g., Hunter* v. *Erickson,* 393 U. S. 385 (1969); *Reitman* v. *Mulkey,* 387 U. S. 369 (1967); *Washington* v. *Seattle School Dist. No. 1,* 458 U. S. 457 (1982); *Gordon* v. *Lance,* 403 U. S. 1 (1971). On remand, the State advanced various arguments in an effort to show that

Amendment 2 was narrowly tailored to serve compelling interests, but the trial court found none sufficient. It enjoined enforcement of Amendment 2, and the Supreme Court of Colorado, in a second opinion, affirmed the ruling. 882 P. 2d 1335 (1994) *(Evans II).* We granted certiorari, 513 U. S. 1146 (1995), and now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.

II

The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible. We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado's Supreme Court. The state court, deeming it unnecessary to determine the full extent of the amendment's reach, found it invalid even on a modest reading of its implications. The critical discussion of the amendment, set out in *Evans I,* is as follows:

> "The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. *See* Aspen, Colo., Mun. Code § 13–98 (1977) (prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation); Boulder, Colo., Rev. Code §§ 12–1–2 to –4 (1987) (same); Denver, Colo., Rev. Mun. Code art. IV, §§ 28–91 to –116 (1991) (same); Executive Order No. D0035 (December 10, 1990) (prohibiting employment discrimination for 'all state employees, classified and exempt' on the basis of sexual orientation); Colorado Insurance Code, § 10–3–1104, 4A C. R. S. (1992 Supp.) (forbidding health insurance providers from determining insurability and premiums based on an applicant's, a beneficiary's, or an insured's

> sexual orientation); and various provisions prohibiting discrimination based on sexual orientation at state colleges.[26]
>
> "[26] Metropolitan State College of Denver prohibits college sponsored social clubs from discriminating in membership on the basis of sexual orientation and Colorado State University has an antidiscrimination policy which encompasses sexual orientation.
>
> "The 'ultimate effect' of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." 854 P. 2d, at 1284–1285, and n. 26.

Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

The change Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching, both on its own terms and when considered in light of the structure and operation of modern antidiscrimination laws. That structure is well illustrated by contemporary statutes and ordinances prohibiting discrimination by providers of public accommodations. "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 571 (1995). The duty was a general one and did not specify protection for particular groups. The common-law rules, however, proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations, *Civil Rights Cases*, 109 U. S. 3, 25 (1883). In consequence, most States have chosen to counter discrimination by enacting detailed statutory schemes. See, *e. g.*, S. D. Codified Laws §§20–13–10, 20–13–22, 20–13–23 (1995); Iowa Code §§216.6–216.8 (1994); Okla. Stat., Tit. 25, §§1302, 1402 (1987); 43 Pa. Cons. Stat. §§953, 955 (Supp. 1995); N. J. Stat. Ann. §§10:5–3, 10:5–4 (West Supp. 1995); N. H. Rev. Stat. Ann. §§354–A:7, 354–A:10, 354–A:17 (1995); Minn. Stat. §363.03 (1991 and Supp. 1995).

Colorado's state and municipal laws typify this emerging tradition of statutory protection and follow a consistent pattern. The laws first enumerate the persons or entities subject to a duty not to discriminate. The list goes well beyond the entities covered by the common law. The Boulder ordinance, for example, has a comprehensive definition of entities deemed places of "public accommodation." They include "any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind." Boulder Rev. Code §12–1–1(j) (1987). The Denver ordinance is of similar breadth, applying, for example, to hotels, restaurants, hospitals, dental clinics, theaters, banks, common carriers, travel and insurance agencies, and "shops and stores dealing with goods or services of any kind," Denver Rev. Municipal Code, Art. IV, §28–92 (1991).

These statutes and ordinances also depart from the common law by enumerating the groups or persons within their ambit of protection. Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply. In following this approach, Colorado's state and local governments have not limited antidiscrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny under our cases. See, *e. g., J. E. B.* v. *Alabama ex rel. T. B.,* 511 U. S. 127, 135 (1994) (sex); *Lalli* v. *Lalli,* 439 U. S. 259, 265 (1978) (illegitimacy); *McLaughlin* v. *Florida,* 379 U. S. 184, 191–192 (1964) (race); *Oyama* v. *California,* 332 U. S. 633 (1948) (ancestry). Rather, they set forth an extensive catalog of traits which cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates—and, in recent times, sexual orientation. Aspen Municipal Code § 13–98(a)(1) (1977); Boulder Rev. Code §§ 12–1–1 to 12–1–4 (1987); Denver Rev. Municipal Code, Art. IV, §§ 28–92 to 28–119 (1991); Colo. Rev. Stat. §§ 24–34–401 to 24–34–707 (1988 and Supp. 1995).

Amendment 2 bars homosexuals from securing protection against the injuries that these public-accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment. See, *e. g.,* Aspen Municipal Code §§ 13–98(b), (c) (1977); Boulder Rev. Code §§ 12–1–2, 12–1–3 (1987); Denver Rev. Municipal Code, Art. IV, §§ 28–93 to 28–95, 28–97 (1991).

Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government. The State Supreme Court cited two examples of protections in the governmental sphere that are now rescinded and may not be reintroduced. The first is Colorado Executive Order D0035 (1990), which forbids employment discrimination against " 'all state employees, classified and exempt' on the basis of sexual orientation." 854 P. 2d, at 1284. Also repealed, and now forbidden, are "various provisions prohibiting discrimination based on sexual orientation at state colleges." *Id.*, at 1284, 1285. The repeal of these measures and the prohibition against their future reenactment demonstrate that Amendment 2 has the same force and effect in Colorado's governmental sector as it does elsewhere and that it applies to policies as well as ordinary legislation.

Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings. See, *e. g.*, Colo. Rev. Stat. § 24–4–106(7) (1988) (agency action subject to judicial review under arbitrary and capricious standard); § 18–8–405 (making it a criminal offense for a public servant knowingly, arbitrarily, or capriciously to refrain from performing a duty imposed on him by law); § 10–3–1104(1)(f) (prohibiting "unfair discrimination" in insurance); 4 Colo. Code of Regulations 801–1, Policy 11–1 (1983) (prohibiting discrimination in state employment on grounds of specified traits or "other non-merit factor"). At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and, thus, forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality, and so would appear to be no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.

If this consequence follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment has this effect, however, and neither need we. In the course of rejecting the argument that Amendment 2 is intended to conserve resources to fight discrimination against suspect classes, the Colorado Supreme Court made the limited observation that the amendment is not intended to affect many antidiscrimination laws protecting nonsuspect classes, *Romer II,* 882 P. 2d, at 1346, n. 9. In our view that does not resolve the issue. In any event, even if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

III

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256, 271–272 (1979); *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415 (1920). We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. See, *e. g., Heller* v. *Doe,* 509 U. S. 312, 319–320 (1993).

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

Taking the first point, even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. See *New Orleans* v. *Dukes*, 427 U. S. 297 (1976) (tourism benefits justified classification favoring pushcart vendors of certain longevity); *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483 (1955) (assumed health concerns justified law favoring optometrists over opticians); *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106 (1949) (potential traffic hazards justified exemption of vehicles advertising the owner's products from general advertising ban); *Kotch* v. *Board of River Port Pilot Comm'rs for Port of New Orleans*, 330 U. S. 552 (1947) (licensing scheme that disfavored persons unrelated to current river boat pilots justified by possible efficiency and safety benefits of a closely knit pilotage system). The laws challenged in the cases just cited were narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law. See *Railroad Retirement Bd.* v. *Fritz,* 449 U. S. 166, 181 (1980) (STEVENS, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect").

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas & Elec. Co.* v. *Coleman,* 277 U. S. 32, 37–38 (1928).

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. " 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' " *Sweatt* v. *Painter,* 339 U. S. 629, 635 (1950) (quoting *Shelley* v. *Kraemer,* 334 U. S. 1, 22 (1948)). Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942) (quoting *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369 (1886)).

Davis v. *Beason*, 133 U. S. 333 (1890), not cited by the parties but relied upon by the dissent, is not evidence that Amendment 2 is within our constitutional tradition, and any reliance upon it as authority for sustaining the amendment is misplaced. In *Davis*, the Court approved an Idaho territorial statute denying Mormons, polygamists, and advocates of polygamy the right to vote and to hold office because, as the Court construed the statute, it "simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offences, and those who advocate a practical resistance to the laws of the Territory and justify and approve the commission of crimes forbidden by it." *Id.*, at 347. To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam)*. To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome. *Dunn* v. *Blumstein*, 405 U. S. 330, 337 (1972); cf. *United States* v. *Brown*, 381 U. S. 437 (1965); *United States* v. *Robel*, 389 U. S. 258 (1967). To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable. See *Richardson* v. *Ramirez*, 418 U. S. 24 (1974).

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 534

(1973). Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, *Kadrmas* v. *Dickinson Public Schools,* 487 U. S. 450, 462 (1988), and Amendment 2 does not.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . ." *Civil Rights Cases,* 109 U. S., at 24.

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a " 'bare . . . desire to harm' " homosexuals, *ante,* at 634, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers* v. *Hardwick,* 478 U. S. 186 (1986), and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is *precisely* the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality, *ante,* at 634, is evil. I vigorously dissent.

I

Let me first discuss Part II of the Court's opinion, its longest section, which is devoted to rejecting the State's arguments that Amendment 2 "puts gays and lesbians in the same position as all other persons," and "does no more than deny homosexuals special rights," *ante*, at 626. The Court concludes that this reading of Amendment 2's language is "implausible" under the "authoritative construction" given Amendment 2 by the Supreme Court of Colorado. *Ibid.*

In reaching this conclusion, the Court considers it unnecessary to decide the validity of the State's argument that Amendment 2 does not deprive homosexuals of the "protection [afforded by] general laws and policies that prohibit arbitrary discrimination in governmental and private settings." *Ante*, at 630. I agree that we need not resolve that dispute, because the Supreme Court of Colorado has resolved it for us. In the case below, 882 P. 2d 1335 (1994), the Colorado court stated:

> "[I]t is significant to note that Colorado law currently proscribes discrimination against persons who are not suspect classes, including discrimination based on age, § 24–34–402(1)(a), 10A C. R. S. (1994 Supp.); marital or family status, § 24–34–502(1)(a), 10A C. R. S. (1994 Supp.); veterans' status, § 28–3–506, 11B C. R. S. (1989); and for any legal, off-duty conduct such as smoking tobacco, § 24–34–402.5, 10A C. R. S. (1994 Supp.). *Of course Amendment 2 is not intended to have any effect on this legislation, but seeks only to prevent the adoption of anti-discrimination laws intended to protect gays, lesbians, and bisexuals.*" *Id.*, at 1346, n. 9 (emphasis added).

The Court utterly fails to distinguish this portion of the Colorado court's opinion. Colorado Rev. Stat. § 24–34–402.5 (Supp. 1995), which this passage authoritatively declares *not* to be affected by Amendment 2, was respondents' primary example of a generally applicable law whose protections would be unavailable to homosexuals under Amendment 2. See Brief for Respondents Evans et al. 11–12. The clear import of the Colorado court's conclusion that it is not affected is that "general laws and policies that prohibit arbitrary discrimination" would continue to prohibit discrimination on the basis of homosexual conduct as well. This analysis, which is fully in accord with (indeed, follows inescapably from) the text of the constitutional provision, lays to rest such horribles, raised in the course of oral argument, as the prospect that assaults upon homosexuals could not be prosecuted. The amendment prohibits *special treatment* of homosexuals, and nothing more. It would not affect, for example, a requirement of state law that pensions be paid to all retiring state employees with a certain length of service; homosexual employees, as well as others, would be entitled to that benefit. But it would prevent the State or any municipality from making death-benefit payments to the "life partner" of a homosexual when it does not make such payments to the long-time roommate of a nonhomosexual employee. Or again, it does not affect the requirement of the State's general insurance laws that customers be afforded coverage without discrimination unrelated to anticipated risk. Thus, homosexuals could not be denied coverage, or charged a greater premium, with respect to auto collision insurance; but neither the State nor any municipality could require that distinctive health insurance risks associated with homosexuality (if there are any) be ignored.

Despite all of its hand wringing about the potential effect of Amendment 2 on general antidiscrimination laws, the Court's opinion ultimately does not dispute all this, but assumes it to be true. See *ante*, at 630. The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain *preferential* treatment without amending the State Constitution. That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain *preferential* treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged "equal protection" violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.

The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. And it seems to me most unlikely that any multilevel democracy can function under such a principle. For *whenever* a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (*i. e.*, by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection, which is why the Court's theory is unheard of.

The Court might reply that the example I have given is *not* a denial of equal protection only because the same "rational basis" (avoidance of corruption) which renders constitutional the *substantive discrimination* against relatives (*i. e.*, the fact that they alone cannot obtain city contracts) also automatically suffices to sustain what might be called the *electoral-procedural discrimination* against them (*i. e.*, the fact that they must go to the state level to get this changed). This is of course a perfectly reasonable response, and would explain why "electoral-procedural discrimination" has not hitherto been heard of: A law that is valid in its substance is automatically valid in its level of enactment. But the Court cannot afford to make this argument, for as I shall discuss next, there is no doubt of a rational basis for the substance of the prohibition at issue here. The Court's entire novel theory rests upon the proposition that there is something *special*—something that cannot be justified by normal "rational basis" analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.

II

I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment—for the prohibition of special protection for homosexuals.[1] It is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes. The case most relevant to the issue before us today is not even mentioned in the Court's opinion: In *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years—making homosexual conduct a crime. That holding is unassailable, except by those who think that the Constitution changes to suit current fashions. But in any event it is a given in the present case: Respondents' briefs did not urge overruling *Bowers*, and at oral argument respondents' counsel expressly disavowed any intent to seek such overruling, Tr. of Oral Arg. 53. If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct. (As the Court of Appeals for the District of Columbia Circuit has aptly put it: "If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Padula* v. *Webster*, 822 F. 2d 97, 103 (1987).) And *a fortiori* it is constitutionally permissible for a State to adopt a provision *not even* disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing *special protections* upon homosexual conduct. Respondents (who, unlike the Court, cannot afford the luxury of ignoring inconvenient precedent) counter *Bowers* with the argument that a greater-includes-the-lesser rationale cannot justify Amendment 2's application to individuals who do not engage in homosexual acts, but are merely of homosexual "orientation." Some Courts of Appeals have concluded that, with respect to laws of this sort at least, that is a distinction without a difference. See *Equality Foundation of Greater Cincinnati, Inc.* v. *Cincinnati*, 54 F. 3d 261, 267 (CA6 1995) ("[F]or purposes of these proceedings, it is virtually impossible to distinguish or separate individuals of a particular *orientation* which predisposes them toward a particular sexual conduct from those who actually *engage* in that particular type of sexual conduct"); *Steffan* v. *Perry*, 41 F. 3d 677, 689–690 (CADC 1994). The Supreme Court of Colorado itself appears to be of this view. See 882 P. 2d, at

---

[1] The Court evidently agrees that "rational basis"—the normal test for compliance with the Equal Protection Clause—is the governing standard. The trial court rejected respondents' argument that homosexuals constitute a "suspect" or "quasi-suspect" class, and respondents elected not to appeal that ruling to the Supreme Court of Colorado. See 882 P. 2d 1335, 1341, n. 3 (1994). And the Court implicitly rejects the Supreme Court of Colorado's holding, *Evans* v. *Romer*, 854 P. 2d 1270, 1282 (1993), that Amendment 2 infringes upon a "fundamental right" of "independently identifiable class[es]" to "participate equally in the political process." See *ante*, at 625.

1349–1350 ("Amendment 2 targets this class of persons based on four characteristics: sexual orientation; conduct; practices, and relationships. Each characteristic provides a potentially different way of identifying that class of persons who are gay, lesbian, or bisexual. These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying *the same class of persons*") (emphasis added).

But assuming that, in Amendment 2, a person of homosexual "orientation" is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, *Bowers* still suffices to establish a rational basis for the provision. If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual "orientation" is an acceptable stand-in for homosexual conduct. A State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect," *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970). Just as a policy barring the hiring of methadone users as transit employees does not violate equal protection simply because *some* methadone users pose no threat to passenger safety, see *New York City Transit Authority* v. *Beazer*, 440 U. S. 568 (1979), and just as a mandatory retirement age of 50 for police officers does not violate equal protection even though it prematurely ends the careers of many policemen over 50 who still have the capacity to do the job, see *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307 (1976) *(per curiam)*, Amendment 2 is not constitutionally invalid simply because it could have been drawn more precisely so as to withdraw special antidiscrimination protections only from those of homosexual "orientation" who actually engage in homosexual conduct. As JUSTICE KENNEDY wrote, when he was on the Court of Appeals, in a case involving discharge of homosexuals from the Navy: "Nearly any statute which classifies people may be irrational as applied in particular cases. Discharge of the particular plaintiffs before us would be rational, under minimal scrutiny, not because their particular cases present the dangers which justify Navy policy, but instead because the general policy of discharging all homosexuals is rational." *Beller* v. *Middendorf,* 632 F. 2d 788, 808–809, n. 20 (CA9 1980) (citation omitted). See also *Ben-Shalom* v. *Marsh,* 881 F. 2d 454, 464 (CA7 1989), cert. denied, 494 U. S. 1004 (1990).

Moreover, even if the provision regarding homosexual "orientation" *were* invalid, respondents' challenge to Amendment 2—which is a facial challenge—must fail. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno,* 481 U. S. 739, 745 (1987). It would not be enough for respondents to establish (if they could) that Amendment 2 is unconstitutional as applied to those of homosexual "orientation"; since, under *Bowers,* Amendment 2 is unquestionably constitutional as applied to those who engage in homosexual conduct, the facial challenge cannot succeed. Some individuals of homosexual "orientation" who do not engage in homosexual acts might successfully bring an as-applied challenge to Amendment 2, but so far as the record indicates, none of the respondents is such a person. See App. 4–5 (complaint describing each of the individual respondents as either "a gay man" or "a lesbian").[2]

---

[2] The Supreme Court of Colorado stated: "We hold that the portions of Amendment 2 that would remain if only the provision concerning sexual orientation were stricken are not autonomous and thus, not severable," 882 P. 2d, at 1349. That statement was premised, however, on the proposition that "[the] four characteristics [described in the Amendment—sexual orientation, conduct, practices, and relationships] are not truly severable from one another because each provides nothing more than a different way of identifying *the same class of persons.*" *Id.,* at 1349–1350 (emphasis added). As I have discussed above, if that premise is true—if the

III

The foregoing suffices to establish what the Court's failure to cite any case remotely in point would lead one to suspect: No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here. But the case for Colorado is much stronger than that. What it has done is not only unprohibited, but eminently reasonable, with close, congressionally approved precedent in earlier constitutional practice.

First, as to its eminent reasonableness. The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as un-American. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers.* The Colorado amendment does not, to speak entirely precisely, prohibit giving favored status to people who are *homosexuals;* they can be favored for many reasons—for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status *because of their homosexual conduct*—that is, it prohibits favored status *for homosexuality.*

But though Coloradans are, as I say, *entitled* to be hostile toward homosexual conduct, the fact is that the degree of hostility reflected by Amendment 2 is the smallest conceiv-

---

entire class affected by the Amendment takes part in homosexual conduct, practices, and relationships—*Bowers* alone suffices to answer all constitutional objections. Separate consideration of persons of homosexual "orientation" is necessary only if one believes (as the Supreme Court of Colorado did not) that that is a distinct class.

able. The Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled "gay-bashing" is so false as to be comical. Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so. See 1971 Colo. Sess. Laws, ch. 121, § 1. But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens. Cf. Brief for Lambda Legal Defense and Education Fund, Inc., et al. as *Amici Curiae* in *Bowers* v. *Hardwick*, O. T. 1985, No. 85–140, p. 25, n. 21 (antisodomy statutes are "unenforceable by any but the most offensive snooping and wasteful allocation of law enforcement resources"); Kadish, The Crisis of Overcriminalization, 374 The Annals of the American Academy of Political and Social Science 157, 161 (1967) ("To obtain evidence [in sodomy cases], police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution").

There is a problem, however, which arises when criminal sanction of homosexuality is eliminated but moral and social disapprobation of homosexuality is meant to be retained. The Court cannot be unaware of that problem; it is evident in many cities of the country, and occasionally bubbles to the surface of the news, in heated political disputes over such matters as the introduction into local schools of books teaching that homosexuality is an optional and fully acceptable "alternative life style." The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, see Record, Exh. MMM, have high disposable income, see *ibid.;* App. 254 (affidavit of Prof. James Hunter), and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality. See, *e. g.*, Jacobs, The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969–1991, 72 Neb. L. Rev. 723, 724 (1993) ("[T]he task of gay rights proponents is to move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation").

By the time Coloradans were asked to vote on Amendment 2, their exposure to homosexuals' quest for social endorsement was not limited to newspaper accounts of happenings in places such as New York, Los Angeles, San Francisco, and Key West. Three Colorado cities—Aspen, Boulder, and Denver—had enacted ordinances that listed "sexual orientation" as an impermissible ground for discrimination, equating the moral disapproval of homosexual conduct with racial and religious bigotry. See Aspen Municipal Code § 13–98 (1977); Boulder Rev. Municipal Code §§ 12–1–1 to 12–1–11 (1987); Denver Rev. Municipal Code, Art. IV, §§ 28–91 to 28–116 (1991). The phenomenon had even appeared statewide: The Governor of Colorado had signed an executive order pronouncing that "in the State of Colorado we recognize the diversity in our pluralistic society and strive to bring an end to discrimination in any form," and directing state agency-heads to "ensure non-discrimination" in hiring and promotion based on, among other things, "sexual orientation." Executive Order No. D0035 (Dec. 10, 1990). I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.

That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides. It put directly, to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional. Lacking any cases to establish that facially absurd proposition, it simply asserts that it *must* be unconstitutional, because it has never happened before.

> "[Amendment 2] identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive . . . .
>
> "It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Ante*, at 633.

As I have noted above, this is proved false every time a state law prohibiting or disfavoring certain conduct is passed, because such a law prevents the adversely affected group—whether drug addicts, or smokers, or gun owners, or motorcyclists—from changing the policy thus established in "each of [the] parts" of the State. What the Court says is even demonstrably false at the constitutional level. The Eighteenth Amendment to the Federal Constitution, for example, deprived those who drank alcohol not only of the power to alter the policy of prohibition *locally* or through *state legislation*, but even of the power to alter it through *state constitutional amendment* or *federal legislation*. The

Establishment Clause of the First Amendment prevents theocrats from having their way by converting their fellow citizens at the local, state, or federal statutory level; as does the Republican Form of Government Clause prevent monarchists.

But there is a much closer analogy, one that involves precisely the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it. The Constitutions of the States of Arizona, Idaho, New Mexico, Oklahoma, and Utah *to this day* contain provisions stating that polygamy is "forever prohibited." See Ariz. Const., Art. XX, par. 2; Idaho Const., Art. I, § 4; N. M. Const., Art. XXI, § 1; Okla. Const., Art. I, § 2; Utah Const., Art. III, § 1. Polygamists, and those who have a polygamous "orientation," have been "singled out" by these provisions for much more severe treatment than merely denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions. The Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local-option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.

The United States Congress, by the way, *required* the inclusion of these antipolygamy provisions in the Constitutions of Arizona, New Mexico, Oklahoma, and Utah, as a condition of their admission to statehood. See Arizona Enabling Act, 36 Stat. 569; New Mexico Enabling Act, 36 Stat. 558; Oklahoma Enabling Act, 34 Stat. 269; Utah Enabling Act, 28 Stat. 108. (For Arizona, New Mexico, and Utah, moreover, the Enabling Acts required that the antipolygamy provisions be "irrevocable without the consent of the United States and the people of said State"—so that not only were "each of [the] parts" of these States not "open on impartial terms" to polygamists, but even the States as a whole were not;

polygamists would have to persuade the whole country to their way of thinking.) Idaho adopted the constitutional provision on its own, but the 51st Congress, which admitted Idaho into the Union, found its Constitution to be "republican in form *and . . . in conformity with the Constitution of the United States.*" Act of Admission of Idaho, 26 Stat. 215 (emphasis added). Thus, this "singling out" of the sexual practices of a single group for statewide, democratic vote—so utterly alien to our constitutional system, the Court would have us believe—has not only happened, but has received the explicit approval of the United States Congress.

I cannot say that this Court has explicitly approved any of these state constitutional provisions; but it has approved a territorial statutory provision that went even further, depriving polygamists of the ability even to achieve a constitutional amendment, by depriving them of the power to vote. In *Davis* v. *Beason,* 133 U. S. 333 (1890), Justice Field wrote for a unanimous Court:

> "In our judgment, § 501 of the Revised Statutes of Idaho Territory, which provides that 'no person . . . who is a bigamist or polygamist or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law . . . is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory,' *is not open to any constitutional or legal objection.*" *Id.,* at 346–347 (emphasis added).

To the extent, if any, that this opinion permits the imposition of adverse consequences upon mere abstract advocacy of polygamy, it has, of course, been overruled by later cases. See *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969) *(per curiam).* But the proposition that polygamy can be criminalized, and those engaging in that crime deprived of the vote, remains good law. See *Richardson* v. *Ramirez,* 418 U. S. 24, 53 (1974). *Beason* rejected the argument that "such discrimination is a denial of the equal protection of the laws." Brief for Appellant in *Davis* v. *Beason,* O. T. 1889, No. 1261, p. 41. Among the Justices joining in that rejection were the two whose views in other cases the Court today treats as equal protection lodestars—Justice Harlan, who was to proclaim in *Plessy* v. *Ferguson,* 163 U. S. 537, 559 (1896) (dissenting opinion), that the Constitution "neither knows nor tolerates classes among citizens," quoted *ante,* at 623, and Justice Bradley, who had earlier declared that "class legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment," *Civil Rights Cases,* 109 U. S. 3, 24 (1883), quoted *ante,* at 635.[3]

---

[3] The Court labors mightily to get around *Beason,* see *ante,* at 634, but cannot escape the central fact that this Court found the statute at issue—which went much further than Amendment 2, denying polygamists not merely special treatment but the right *to vote*—"not open to any constitutional or legal objection," rejecting the appellant's argument (much like the argument of respondents today) that the statute impermissibly "single[d] him out," Brief for Appellant in *Davis* v. *Beason,* O. T. 1889, No. 1261, p. 41. The Court adopts my conclusions that (a) insofar as *Beason* permits the imposition of adverse consequences based upon mere advocacy, it has been overruled by subsequent cases, and (b) insofar as *Beason* holds that convicted felons may be denied the right to vote, it remains good law. To these conclusions, it adds something new: the claim that "[t]o the extent *[Beason]* held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome." *Ante,* at 634. But if that is so, it is only because we have declared the right *to vote* to be a "fundamental political right," see, *e. g., Dunn* v. *Blumstein,* 405 U. S. 330, 336 (1972), deprivation of which triggers strict scrutiny. Amendment 2, of course, does not deny the fundamental right to vote, and the Court rejects the Colorado court's view that there exists a fundamental right to participate in the political process. Strict scrutiny is thus not in play here. See *ante,* at 631. Finally, the Court's

This Court cited *Beason* with approval as recently as 1993, in an opinion authored by the same Justice who writes for the Court today. That opinion said: "[A]dverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. . . . See, *e. g.*, . . . *Davis* v. *Beason*, 133 U. S. 333 (1890)." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 535 (1993). It remains to be explained how § 501 of the Idaho Revised Statutes was not an "impermissible targeting" of polygamists, but (the much more mild) Amendment 2 is an "impermissible targeting" of homosexuals. Has the Court concluded that the perceived social harm of polygamy is a "legitimate concern of government," and the perceived social harm of homosexuality is not?

IV

I strongly suspect that the answer to the last question is yes, which leads me to the last point I wish to make: The Court today, announcing that Amendment 2 "defies . . . conventional [constitutional] inquiry," *ante*, at 632, and "confounds [the] normal process of judicial review," *ante*, at 633, employs a constitutional theory heretofore unknown to frustrate Colorado's reasonable effort to preserve traditional American moral values. The Court's stern disapproval of "animosity" towards homosexuality might be compared with what an earlier Court (including the revered Justices Harlan and Bradley) said in *Murphy* v. *Ramsey*, 114 U. S. 15 (1885), rejecting a constitutional challenge to a United States statute that denied the franchise in federal territories to those who engaged in polygamous cohabitation:

> "[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-

---

suggestion that § 501 of the Revised Statutes of Idaho, and Amendment 2, deny rights on account of "status" (rather than conduct) opens up a broader debate involving the significance of *Bowers* to this case, a debate which the Court is otherwise unwilling to join, see *supra*, at 640–643.

> governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." *Id.*, at 45.

I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.

But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes. To suggest, for example, that this constitutional amendment springs from nothing more than "'a bare . . . desire to harm a politically unpopular group,'" *ante*, at 634, quoting *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 534 (1973), is nothing short of insulting. (It is also nothing short of preposterous to call "politically unpopular" a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2, see App. to Pet. for Cert. C–18.)

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals. Bylaws of the Association of American Law Schools, Inc. § 6–4(b); Executive Committee Regulations of the Association of American Law Schools § 6.19, in 1995 Handbook, Association of American Law Schools. This law-school view of what "prejudices" must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws, see, *e. g.*, Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments of 1975, H. R. 5452, 94th Cong., 1st Sess. (1975), and which took the pains to exclude them specifically from the Americans with Disabilities Act of 1990, see 42 U. S. C. § 12211(a) (1988 ed., Supp. V).

* * *

Today's opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent.

HENDERSON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 95–232. Argued March 19, 1996—Decided May 20, 1996

Petitioner Henderson filed this suit under the Suits in Admiralty Act for injuries he received as a seaman aboard a vessel owned by the United States. He accomplished service on the United States in the manner and within the time allowed by Federal Rule of Civil Procedure 4, which sets an extendable 120-day period for service. Service on the Attorney General occurred 47 days after the complaint was filed, but service on the United States Attorney, though timely under Rule 4's extendable deadline, took 148 days. The United States moved to dismiss the action, arguing that although the time and manner of service satisfied Rule 4's requirements, Henderson had failed to serve process "forthwith" as required by §2 of the Suits in Admiralty Act. The District Court dismissed Henderson's complaint for lack of subject-matter jurisdiction, based on Circuit precedent holding that §2's service "forthwith" requirement conditions the Government's waiver of sovereign immunity and is therefore a jurisdictional prerequisite. The Court of Appeals affirmed.

Held: The Suits in Admiralty Act's "forthwith" instruction for service of process has been superseded by Rule 4. Pp. 661–672.

(a) Rule 4's regime conflicts irreconcilably with §2's service "forthwith" instruction. The Federal Rules convey a clear message that complaints are not to be dismissed if served within 120 days, or within such additional time as the court may allow, but §2's "forthwith" instruction is indicative of a far shorter time. The Government urges that the conflict dissolves if one reads Rule 4 as establishing not an affirmative right to serve a complaint within 120 days, but an outer boundary for timely service. Reading Rule 4 in its historical context, however, leads to the conclusion that the 120-day provision operates as an irreducible allowance. Pp. 661–663.

(b) In the Rules Enabling Act, Congress ordered that, in matters of "practice and procedure," 28 U. S. C. §2072(a), the Federal Rules shall govern, and "[a]ll laws in conflict with such rules shall be of no further force or effect," §2072(b). Correspondingly, Federal Rule of Civil Procedure 82 provides that the Rules cannot be construed to extend or limit federal jurisdiction. Section 2 of the Suits in Admiralty Act contains a broad waiver of sovereign immunity in its first sentence, but this does not mean, as the United States asserts, that § 2 in its entirety is "jurisdictional." Several of § 2's provisions, notably its generous venue and transfer provisions, as well as its service provision, are not sensibly typed "substantive" or "jurisdictional." Instead, they have a distinctly facilitative, "procedural" cast, dealing with case processing, not substantive rights or consent to suit. The service "forthwith" prescription is not made "substantive" or "jurisdictional" by its inclusion—along with broad venue choices—in § 2. The prescription is best characterized as a rule of procedure, of the kind Rule 4 supersedes. A plaintiff like Henderson, on commencement of an action under the Suits in Admiralty Act, must resort to Rule 4 for instructions on service of process. In that Rule, one finds instructions governing, *inter alia*, form and issuance of the summons, service of the summons together with the complaint, who may serve process, and proof of service. The Rule also describes how service shall or may be effected on various categories of defendants. It is uncontested that all these prescriptions apply in Suits in Admiralty Act cases, just as they apply in other federal cases. There is no reason why the prescription governing time for service is not, as is the whole of Rule 4, a nonjurisdictional rule governing "practice and procedure" in federal cases, see 28 U. S. C. § 2072(a), consistent with the Rules Enabling Act and Rule 82, and rendering provisions like the Suits in Admiralty Act's service "forthwith" requirement "of no further force or effect," § 2072(b). Pp. 663–672.

51 F. 3d 574, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. SCALIA, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 672. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 673.

Richard A. Sheehy argued the cause for petitioner. With him on the briefs were *Kenneth R. Breitbeil* and *Lauren L. Beck*.

Malcolm L. Stewart argued the cause for the United States. With him on the brief were *Solicitor General Days*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Bender*, *Michael E. Robinson*, and *Timothy R. Lord*.

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the period allowed for service of process in a civil action commenced by a seaman injured aboard a vessel owned by the United States. Recovery in such cases is governed by the Suits in Admiralty Act, 46 U. S. C. App. § 741 *et seq.*, which broadly waives the Government's sovereign immunity. See § 742 (money judgments); § 743 (costs and interest). Rule 4 of the Federal Rules of Civil Procedure allows 120 days to effect service of the summons and timely filed complaint, a period extendable by the court. The Suits in Admiralty Act, however, instructs that service shall be made "forthwith." § 742. The question presented is whether the Act's "forthwith" instruction for service of process has been superseded by the Federal Rule.

In the Rules Enabling Act, 28 U. S. C. § 2071 *et seq.*, Congress ordered that, in matters of "practice and procedure," § 2072(a), the Federal Rules shall govern, and "[a]ll laws in conflict with such rules shall be of no further force or effect," § 2072(b). We hold that, in actions arising under federal law, commenced in compliance with the governing statute of limitations, the manner and timing of serving process are generally nonjurisdictional matters of "procedure" controlled by the Federal Rules.

I

On August 27, 1991, petitioner Lloyd Henderson, a merchant mariner, was injured while working aboard a vessel owned and operated by the United States. On April 8, 1993, after exhausting administrative remedies, Henderson filed a seaman's personal injury action against the United States, pursuant to the Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U. S. C. App. § 741 *et seq.*[1] Under that Act, suits of the kind Henderson commenced "may be brought . . . within two years after the cause of action arises." § 745. Henderson brought his action well within that time period. He commenced suit, as Federal Rule of Civil Procedure 3 instructs, simply "by filing a complaint with the court."[2]

---

[1] Henderson's complaint also invoked the Public Vessels Act, 43 Stat. 1112, as amended, 46 U. S. C. App. § 781 *et seq.* The Government maintains, however, that Henderson's suit falls under the exclusive governance of the Suits in Admiralty Act, because his claim arose from employment aboard a Maritime Administration vessel. See Brief for United States 8,

Having timely filed his complaint, Henderson attempted to follow the Federal Rules on service. It is undisputed that the following Rules, and nothing in the Suits in Admiralty Act, furnished the immediately relevant instructions. Federal Rule of Civil Procedure 4(a) (1988) provided: "Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint." Rule 4(b) provided: "The summons shall be signed by the clerk, [and] be under the seal of the court." Rule 4(d) stated: "The summons and complaint shall be served together."[3]

A series of slips occurred in obtaining the summons required by Rule 4. Henderson's counsel requested the appropriate summons forms and file-stamped copies of the complaint on April 8, 1993, the day he filed Henderson's

---

n. 9 (citing 57 Stat. 45, as amended, 50 U. S. C. App. § 1291(a) (1988 ed.)). Henderson apparently does not contest this assertion. In any case, claims under both Acts proceed the same way. See 46 U. S. C. App. § 782 (suits under the Public Vessels Act "shall be subject to and proceed in accordance with the provisions" of the Suits in Admiralty Act).

[2] In a suit on a right created by federal law, filing a complaint suffices to satisfy the statute of limitations. See *West* v. *Conrail*, 481 U. S. 35, 39 (1987). In a federal-court suit on a state-created right, however, a plaintiff must serve process before the statute of limitations has run, *if* state law so requires for a similar state-court suit. See *Walker* v. *Armco Steel Corp.*, 446 U. S. 740, 752–753 (1980) (reaffirming *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949)). But cf. *Hanna* v. *Plumer*, 380 U. S. 460 (1965) (*method* of service, as distinguished from time period for commencement of civil action, is governed by Federal Rules in all actions, including suits based on state-created rights).

[3] The substance of these provisions is retained in current Rules 4(a), (b), and (c)(1).

complaint. But the court clerk did not respond immediately. Counsel eventually obtained the forms on April 21, 1993, and completed and returned them to the clerk. On May 4, counsel received the summons mailed to him from the clerk's office, and on May 19, counsel sent the summons and complaint, by certified mail, to the Attorney General,[4] who received them on May 25.

Service on the local United States Attorney took longer. On May 25, Henderson's counsel forwarded the summons and complaint, as received from the clerk, to a "constable" with a request to effect service. On June 1, the constable's office returned the documents, informing Henderson's counsel that the summons was not in proper form, because it lacked the court's seal. Counsel thereupon wrote to the court clerk requesting new summons forms with the appropriate court seal. Counsel repeated this request on August 19; ultimately, on August 25, Henderson's counsel received the properly sealed summons.

Once again, Henderson's counsel requested the constable's service and, on August 30, moved for an extension of time to serve the United States Attorney.[5] The court granted the motion, extending the time for service until September 15. The United States Attorney received personal service of the summons and complaint, in proper form, on September 3, 1993.

---

[4] Federal Rule of Civil Procedure 4(d)(4), effective at that time, instructed that "a copy of the summons and of the complaint [be sent] by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia." The same instruction currently appears in Rule 4(i)(1)(B).

[5] Federal Rule of Civil Procedure 4(j), then in force, provided for service of the summons and complaint within 120 days after the filing of the complaint, a time limit subject to extension for good cause. The substance of this provision is retained in current Rule 4(m), which permits a district court to enlarge the time for service "even if there is no good cause shown." Advisory Committee's Notes on 1993 Amendments to Fed. Rule Civ. Proc. 4, 28 U. S. C. App., p. 654.

Thus, the Attorney General received the complaint 47 days after Henderson filed suit, and the United States Attorney was personally served 148 days after Henderson commenced the action by filing his complaint with the court. On November 17, 1993, the United States moved to dismiss the action. The grounds for, and disposition of, that motion led to Henderson's petition for certiorari.

The United States has never maintained that it lacked notice of Henderson's complaint within the 2-year limitation period prescribed for Suits in Admiralty Act claims. See 46 U. S. C. App. § 745; Tr. of Oral Arg. 38–39 (counsel for United States acknowledged that service on Attorney General gave Government actual notice three months before 2-year limitation period ended).[6] Nor has the Government asserted any prejudice to the presentation of its defense stemming from the delayed service of the summons and complaint. And the manner and timing of service, it appears beyond debate, satisfied the requirements of Federal Rule of Civil Procedure 4 (titled "Summons" and detailing prescriptions on service of process).

In support of its motion to dismiss, the United States relied exclusively on § 2 of the Suits in Admiralty Act, 46 U. S. C. App. § 742, which provides in part:

> "The libelant [plaintiff] shall forthwith serve a copy of his libel [complaint] on the United States attorney for [the] district [where suit is brought] and mail a copy thereof by registered mail to the Attorney General of the United States."

This provision has remained unchanged since its enactment in 1920, 18 years before the Federal Rules of Civil Procedure became effective, and 46 years before admiralty cases were brought within the realm of the Civil Rules. The Government argued that Henderson's failure to serve process

---

[6] In any event, the filing of the complaint within the limitation period rendered the action timely. See *supra*, at 657, n. 2.

"forthwith," as required by § 742, deprived the District Court of subject-matter jurisdiction because § 742 describes the conditions of the United States' waiver of sovereign immunity.

The District Court initially denied the Government's motion, but reconsidered the matter based on an intervening Fifth Circuit decision, *United States* v. *Holmberg,* 19 F. 3d 1062, cert. denied, 513 U. S. 986 (1994). The court in *Holmberg,* agreeing with the United States, held that the § 742 service "forthwith" requirement "is a condition of the Government's waiver of sovereign immunity and, thus, a jurisdictional prerequisite." 19 F. 3d, at 1064. In so ruling, the *Holmberg* court rejected the argument that service of process under the Suits in Admiralty Act, as in the generality of cases arising and timely filed under federal law, is a matter of procedure, now governed by the Federal Rules of Civil Procedure.

Bound by *Holmberg,* the District Court dismissed Henderson's complaint for lack of subject-matter jurisdiction, and the Court of Appeals, adhering to *Holmberg,* affirmed. 51 F. 3d 574 (CA5 1995).[7] We granted certiorari to resolve disagreement among lower courts on the question whether Federal Rule 4, which authorizes an extendable 120-day period for service of process, supersedes the Suits in Admiralty Act provision that service on the United States be made "forthwith."[8]

---

[7] The *Holmberg* court "agree[d] that there has been no uniform definition of forthwith," as that term is used in § 742, 19 F. 3d, at 1065, and the Court of Appeals in the instant case took no position on whether service on the Attorney General 47 days after commencement of the action could count as "forthwith." 51 F. 3d, at 577. The court held, however, that the "forthwith" requirement applies to service on both officers—the United States Attorney and the Attorney General—and stated that "completing service in 148 days [through service on the United States Attorney] is not forthwith." *Id.,* at 576.

[8] Compare, *e. g., Libby* v. *United States,* 840 F. 2d 818, 819–821 (CA11 1988); *Kenyon* v. *United States,* 676 F. 2d 1229, 1231 (CA9 1981); *Battaglia*

II

The United States first suggests that Rule 4's extendable 120-day time prescription, and the Suits in Admiralty Act's service "forthwith" instruction, can and should be read harmoniously. The Rule 4 time limit for service, Rule 4(j) at the time Henderson's action commenced,[9] provided:

> "(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant . . . ." Fed. Rule Civ. Proc. 4(j) (1988).

Section 2 of the Suits in Admiralty Act, 46 U. S. C. App. § 742, prescribes service "forthwith," see *supra*, at 659, a word not precisely defined in the Act or in case law, but indicative of a time far shorter than 120 days. The apparent conflict dissolves, the Government urges, if one reads Rule 4 as establishing not "an affirmative right to serve [a] complaint" within 120 days, but only an outer boundary for timely service. See Brief for United States 14, 18, 26; Tr. of Oral Arg. 28, 30.

We reject the Government's view of the time the Federal Rules authorize for service. Reading Rule 4 in its historical context, we conclude that the 120-day provision operates not as an outer limit subject to reduction, but as an irreducible allowance. Prior to 1983, Rule 4 contained no time limit for service. Until the changes installed that year,

---

v. *United States*, 303 F. 2d 683, 685–686 (CA2), cert. dism'd, 371 U. S. 907 (1962), with *Jones & Laughlin Steel, Inc.* v. *Mon River Towing, Inc.*, 772 F. 2d 62, 66 (CA3 1985). See also *Kenyon*, 676 F. 2d, at 1231–1232 (Boochever, J., concurring); *Battaglia*, 303 F. 2d, at 686–687 (Friendly, J., concurring).

[9] Currently, Rule 4(m) states the time limit for service. See *supra*, at 658, n. 5.

United States marshals attended to service. The relevant Rule 4 provisions read:

> "(a) Summons: issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to any other person authorized by Rule 4(c) to serve it. . . .
>
> . . . . .
>
> "(c) By whom served. Service of process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose . . . ." Fed. Rule Civ. Proc. 4(a), (c) (1980).

Marshals were expected to effect service expeditiously, and Rule 41(b), providing for dismissal "[f]or failure of the plaintiff to prosecute," could be invoked as a check against unreasonable delay. See 9 C. Wright & A. Miller, Federal Practice and Procedure §2370, pp. 374–376 (2d ed. 1995); 2 J. Moore, Moore's Federal Practice ¶4.18, p. 436 (2d ed. 1995).

Rule 4 changes made operative in 1983 completed a shift in responsibility for service from the United States marshals to the plaintiff. See Mullenix, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N. C. L. Rev. 795, 845 (1991). With marshals no longer available as routine process servers, the Judicial Conference considered a time control necessary; the Conference proposed, and this Court approved, 120 days from the filing of the complaint as the appropriate limit. Congress relaxed the rule change by authorizing an extension of the 120-day period if the party responsible for service showed "good cause." See *supra,* at 661; 128 Cong. Rec. 30931–30932 (1982), reprinted in 28 U. S. C. App., p. 647.

Most recently, in 1993 amendments to the Rules, courts have been accorded discretion to enlarge the 120-day period "even if there is no good cause shown." See Advisory Committee's Notes on Fed. Rule Civ. Proc. 4, 28 U. S. C. App.,

p. 654.[10] And tellingly, the text of Rule 4 sets out, as "[a] specific instance of good cause," *ibid.*, allowance of "a reasonable time" to "cur[e] the failure to serve multiple officers . . . of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General" within the prescribed 120 days. Fed. Rule Civ. Proc. 4(i)(3).

The Federal Rules thus convey a clear message: Complaints are not to be dismissed if served within 120 days, or within such additional time as the court may allow. Furthermore, the United States acknowledges that, § 2 of the Suits in Admiralty Act aside, Rule 4's extendable 120-day time prescription applies to the full range of civil litigation, including cases brought against the United States under the Federal Tort Claims Act, 28 U. S. C. § 2675, and the Tucker Act, ch. 359, 24 Stat. 505 (1887) (current version 28 U. S. C. §§ 1346, 1491 and other scattered sections of 28 U. S. C.). See Tr. of Oral Arg. 33. We are therefore satisfied that Rule 4's regime conflicts irreconcilably with Suits in Admiralty Act § 2's service "forthwith" instruction, and we turn to the dispositive question: Does the Rule supersede the inconsistent statutory direction?

III

The Rules Enabling Act, 28 U. S. C. § 2071 *et seq.*, authorizes the Supreme Court "to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals," § 2072(a), and directs:

---

[10] Rule 4(m), captioned "Time Limit for Service," currently provides:

"If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant *or direct that service be effected within a specified time;* provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. . . ." (Emphasis added.)

> "Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." § 2072(b).

Correspondingly, and in confirmation of the understanding and practice under the former Federal Equity Rules, Federal Rule of Civil Procedure 82 provides: "[The Federal Rules of Civil Procedure] shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." See 1937 Advisory Committee's Notes on Fed. Rule Civ. Proc. 82, 28 U. S. C. App., p. 821 (Rule 82 confirms that the Rules' broad allowance of claim joinder "does not extend federal jurisdiction."); see also 12 Wright & Miller, *supra*, § 3141, at 210–214.

According to the United States, Rule 4 cannot supersede § 2 of the Suits in Admiralty Act, 46 U. S. C. App. § 742, for the latter is "jurisdictional" and affects "substantive rights" by setting the terms on which the United States waives its sovereign immunity. Henderson, in contrast, characterizes the Suits in Admiralty Act's service "forthwith" instruction as a nonjurisdictional processing rule. Service "forthwith," he urges, forms no part of the immunity waiver or § 745's statute of limitations, but is simply a direction for the conduct of litigation once the case is timely launched in court—a characteristically "how to" direction in conflict with, and therefore superseded by, Rule 4.

Before examining the text of § 742 to determine the character of the service "forthwith" provision, we note that the conflict with Rule 4 is of relatively recent vintage. The Suits in Admiralty Act, which allows *in personam* suits against the United States for maritime torts, was enacted in 1920, 18 years before the advent of the Federal Rules. Furthermore, admiralty cases were processed, from 1845 until 1966, under discrete Admiralty Rules. Even after 1966, the year admiralty cases were brought under the governance of the Federal Rules of Civil Procedure, Rule 4 and the Suits in Admiralty Act service "forthwith" provision could coexist. Rule 4, as just recounted, originally contained no time prescription, only the direction that, "[u]pon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service," generally to a United States marshal. See *supra*, at 662. It was only in 1983, when plaintiffs were made responsible for service without the aid of the marshal, that the 120-day provision came into force, a provision that rendered Rule 4's time frame irreconcilable with § 742's service "forthwith" instruction.

Section 2 of the Suits in Admiralty Act, 46 U. S. C. App. § 742, captioned "Libel in personam," contains a broad waiver of sovereign immunity in its first sentence:

> "In cases where if [a vessel owned or operated by the United States] were privately owned or operated . . . a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . . ."

Section 3 of the Act, 46 U. S. C. App. § 743, although captioned "Procedure in cases of libel in personam," completes the immunity waiver by providing for costs and interest on money judgments against the United States.[11] See *United States* v. *Bodcaw Co.*, 440 U. S. 202, 203–204, n. 3 (1979); Fed. Rule Civ. Proc. 54(d)(1) (absent an authorizing statute, United States is not liable for costs); *Library of Congress* v. *Shaw*, 478 U. S. 310, 314 (1986) (absent an authorizing statute, United States is not liable for interest).

The United States asserts that not just the first sentence of § 742, but that section in its entirety is "jurisdictional," spelling out the terms and conditions of the Government's waiver of sovereign immunity, in contrast to the next section of the Suits in Admiralty Act, 46 U. S. C. App. § 743, which governs "procedure," specifying in its first sentence: "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." See Brief for United States 26–27; see also *Holmberg*, 19 F. 3d, at 1064; *Libby* v. *United States*, 840 F. 2d 818, 820 (CA11 1988) ("The fact that the waiver of sovereign immunity is declared in section 742, while the procedures governing admiralty suits against the United States are specified in section 743, indicates that the requirements contained in section 742 are more than procedural."). The dissent adopts this argument hook, line, and sinker. See *post*, at 674–675 (finding key to text and structure of the Suits in Admiralty Act in Congress' placement of service requirement in § 2 (46 U. S. C. App. § 742) rather than § 3 (46 U. S. C. App. § 743)). But just as § 743 is not "purely procedural," for it waives the Sovereign's immunity as to costs and interest, so § 742 is not pervasively "jurisdictional."

---

[11] Specifically, the second sentence of § 743 reads:

"A decree against the United States . . . may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based."

The sentence immediately following § 742's broad waiver, and immediately preceding the sentence on service, reads:

> "Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel . . . charged with liability is found."

This notably generous-to-plaintiffs provision will be recognized instantly as one describing venue choices, not subject-matter jurisdiction. Cf. 28 U. S. C. § 1391 ("Venue generally").

Section 742's final sentence provides:

> "Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States."

Cf. 28 U. S. C. § 1404 (change of venue to more convenient forum); § 1406 (authorizing transfer, rather than dismissal, when venue is improperly laid). Congress simultaneously added to the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act the transfer provision just set out so that "jurisdictional" dismissals could be avoided when plaintiffs commenced suit under the wrong statute. See S. Rep. No. 1894, 86th Cong., 2d Sess., pp. 2–5 (1960); cf. 28 U. S. C. § 1631 (authorizing transfer, *inter alia,* when review of agency action is sought in the wrong federal court). In short, far from reining in "jurisdiction," § 742's venue and transfer provisions afford plaintiffs multiple forum choices and spare plaintiffs from dismissal for suing in the wrong place or under the wrong Act.[12]

Section 742's critical sentence on service reads:

> "The libelant [plaintiff] shall forthwith serve a copy of his libel [complaint] on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General . . . ."

Rule 4, as observed at oral argument, see Tr. of Oral Arg. 27–28, provides for dispatch of the summons and complaint to the Attorney General "by registered or certified mail." See *supra,* at 658, and n. 4. The Government's sovereign-immunity waiver, counsel for the United States agreed, did not depend on registered mail service, the sole form of mailing § 742 authorizes; "in this day and age," counsel said, "certified mail would be acceptable." Tr. of Oral Arg. 28–29. But see *post,* at 678, n. 4 ("jurisdiction in [a Suits in Admiralty Act] suit may turn upon the plaintiff's use of registered mail"). It thus appears that several of § 742's provisions are not sensibly typed "substantive" or "jurisdictional." Instead, they have a distinctly facilitative, "procedural" cast.

---

[12] While striving for fidelity to what Congress wrote, see *post,* at 674, 679, the dissent inexplicably writes off many of § 742's words as "largely beside the point," *post,* at 674.

They deal with case processing, not substantive rights or consent to suit.[13]

If the service "forthwith" prescription is not made "substantive" or "jurisdictional" by its inclusion—along with broad venue choices—in § 742, is it a rule of procedure superseded by Rule 4? Before we address that dispositive question, we note a preliminary issue. Rule 4(j), which contained the 120-day prescription at the time Henderson filed suit, was not simply prescribed by this Court pursuant to the Rules Enabling Act. See 28 U. S. C. § 2074 (rules transmitted by Court to Congress "not later than May 1" become effective "no earlier than December 1" of the same year unless Congress otherwise provides). Instead, the Rule was enacted into law by Congress as part of the Federal Rules of Civil Procedure Amendments Act of 1982, § 2, 96 Stat. 2527. See *supra*, at 662. As the United States acknowledges, however, a Rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes. See Brief for United States 16, n. 14 ("We agree with petitioner . . . that Section 2072(b) provides the best evidence of congressional intent regarding the proper construction of Rule 4(j) and its interaction with other laws.").

---

[13] Even before admiralty proceedings were placed under the governance of the Federal Rules, Judge Henry Friendly trenchantly observed:

"I cannot believe Congress meant [to render 'jurisdictional' every failure by a libelant to comply with a procedural step outlined in the Suits in Admiralty Act]; I should have supposed that, once Congress gave the basic consent to sue the United States, as it did in the first sentence of [§ 742], it was content to have the courts decide the effect of various procedural lapses in the same manner as 'if such vessel were privately owned or operated.'" *Battaglia* v. *United States*, 303 F. 2d, at 686 (concurring opinion).

Circuit precedent was otherwise, however, and therefore Judge Friendly reluctantly concurred in the "Draconian conclusion" that a 4-month delay in mailing the pleadings to the Attorney General called for dismissal of the case, despite "forthwith" service on the United States Attorney. Cf. Fed. Rule Civ. Proc. 4(i)(3) ("court shall allow a reasonable time" to "cur[e] the failure to serve multiple officers . . . of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General").

Returning to the dispositive question, we need not linger over the answer. What we have so far said, and the further elaboration below, lead securely to this response: Rule 4 governs summons and service in this case in whole and not in part.

A plaintiff like Henderson, on commencement of an action under the Suits in Admiralty Act, must immediately resort to Rule 4 for instructions on service of process. See *supra*, at 657, and nn. 3, 4. In that Rule, one finds instructions governing, *inter alia*, form and issuance of the summons, service of the summons together with the complaint, who may serve process, and proof of service.[14] The Rule also describes how service shall or may be effected on various categories of defendants,[15] including, in detail, "the United States, and Its Agencies, Corporations, or Officers."[16] All these prescriptions, it is uncontested, apply in Suits in Admiralty Act cases, just as they apply in other federal cases. We see no reason why the prescription governing time for service[17] is not, as is the whole of Rule 4, a nonjurisdictional rule governing "practice and procedure" in federal cases, see 28 U. S. C. § 2072(a), consistent with the Rules Enabling Act and Federal Rule 82, and rendering provisions like the Suits in Admiralty Act's service "forthwith" requirement "of no further force or effect," § 2072(b). See *Jones & Laughlin Steel, Inc.* v. *Mon River Towing, Inc.*, 772 F. 2d 62, 66 (CA3 1985) (just as Rule 4 "now governs the method of service of process in admiralty actions, as well as service of process on the United States in all civil cases to which it is a party," so the "congressional enactment of a uniform 120-day period for accomplishing service of process" supersedes inconsistent prior law, in particular, "the Suits in Admiralty Act's requirement of forthwith service"); *Kenyon* v. *United States*, 676 F. 2d 1229, 1232 (CA9 1981) (Boochever, J., concurring) ("I can see no logical reason why there should be a different method of service in this one instance [Suits in Admiralty Act cases] in which the United States is a defendant.").[18]

---

[14] Currently, Fed. Rule Civ. Proc. 4(a), (b), (c), and *(l)*.

[15] Currently, Fed. Rule Civ. Proc. 4(e)–(j).

[16] Currently, Fed. Rule Civ. Proc. 4(i); formerly, Fed. Rule Civ. Proc. 4(d)(4). See *supra*, at 658, n. 4; *Kenyon*, 676 F. 2d, at 1232 (Boochever, J., concurring) (noting that § 2 of the Suits in Admiralty Act, 46 U. S. C. App. § 742, specifies mailing "by registered mail to the Attorney General of the United States," and commenting that the Federal Rule, then Rule 4(d)(4), supersedes, allowing "registered or certified mail"). The current Rule—4(i)—further facilitates service when the United States is a party by permitting the United States Attorney to designate clerical employees to receive process and allowing service on the United States Attorney by mail. See Fed. Rule Civ. Proc. 4(i)(A).

[17] The Government acknowledges the aim of the rulemakers, from the start, to provide "'a uniform and comprehensive method of service for all actions against the United States,'" Brief for United States 19–20, n. 18 (quoting Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 4, 28 U. S. C. App., p. 641), but tenders a distinction between "method" and "timing" of service, Brief for United States 19–20,

---

n. 18. Current Rule 4(i)(3) shows why the suggested separation of "time" from "method" or "manner" in this context is not credible. That provision, addressing "time" in relation to "manner," instructs:

> "The court shall allow a reasonable time for service of process . . . for the purpose of curing the failure to serve multiple officers . . . of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States."

[18] Judge Boochever, like Judge Friendly, see *supra*, at 668, n. 13, reluctantly concurred in Circuit precedent, which ranked service "forthwith" "a condition precedent to the congressional waiver of the Government's sovereign immunity," *Kenyon*, 676 F. 2d, at 1231. But he stated cogently the view he would take "if freed from the bounds of *stare decisis*":

> "Section 742 does not constitute an integral part of the substantive waiver of sovereign immunity, but is a mere procedural provision necessary at the time of the statute's enactment, to effectuate that waiver. As such it was superseded by the Federal Rules." *Id.*, at 1232 (concurring opinion).

Curiously, although the Ninth Circuit, in *Kenyon* and other cases, has typed the Suits in Admiralty Act service "forthwith" provision "jurisdictional," that Court of Appeals has pointed to a remedy for litigants in Henderson's situation: Amend the complaint, even after the 2-year statute

Service of process, we have come to understand, is properly regarded as a matter discrete from a court's jurisdiction to adjudicate a controversy of a particular kind,[19] or against a particular individual or entity.[20] Its essential purpose is auxiliary, a purpose distinct from the substantive matters aired in the precedent on which the dissent, wrenching cases from context, extensively relies—who may sue,[21] on what claims,[22] for what relief,[23] within what limitations period.[24]

---

of limitations (46 U. S. C. App. § 745) has run, serve the United States Attorney and the Attorney General "forthwith," and by those steps, gain the benefit of the original complaint filing date through the application of the "relation back" provision of Federal Rule of Civil Procedure 15(c). See *Ashland* v. *Ling-Temco-Vought, Inc.*, 711 F. 2d 1431, 1435–1437 (CA9 1983) (allowing such relation back when plaintiff amended a complaint, brought four years earlier under the Federal Tort Claims Act, to assert instead a claim under the Suits in Admiralty Act); cf. Tr. of Oral Arg. 38 (counsel for United States acknowledged that Henderson, who filed his complaint April 8, 1993, could have filed a fresh complaint anytime before August 27 of that year (the date the 2-year statute of limitations expired), and served it "forthwith," thereby avoiding the loss of his claim).

[19] *I. e.*, subject-matter jurisdiction. See 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3522, p. 78 (2d ed. 1984); Restatement (Second) of Judgments § 11, p. 108 (1982) (defining "subject matter jurisdiction" as the "authority [of the court] to adjudicate the type of controversy involved in the action").

[20] On relationships sufficient to support "jurisdiction over persons," see generally Restatement (Second) of Conflict of Laws §§ 27–32, 35–44, 47–52 (1971 and Supp. 1989). See also 4 Wright & Miller, Federal Practice and Procedure § 1064.

[21] See *United States* v. *Sherwood*, 312 U. S. 584 (1941) (Tucker Act, allowing contract claims against United States, does not authorize joinder of claims between private parties).

[22] See *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 39 (1992) (Bankruptcy Code § 106(c) does not waive the Government's sovereign immunity from bankruptcy trustee's monetary relief claims).

[23] See *Library of Congress* v. *Shaw*, 478 U. S. 310, 323 (1986) (Government's waiver of immunity from suit for damages does not waive immunity with respect to interest).

[24] See, *e. g.*, *United States* v. *Williams*, 514 U. S. 527, 534, n. 7 (1995); *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461

Instead, the core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections.[25] Seeing service in this light, and in view of the uniform system Rule 4 of the Federal Rules of Civil Procedure provides, we are satisfied that the service "forthwith" provision of Suits in Admiralty Act, 46 U. S. C. App. § 742, has been displaced by Rule 4, and therefore has no current force or effect.

* * *

For the reasons stated, the judgment of the Court of Appeals affirming the dismissal of Henderson's complaint is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, concurring.

I join the opinion of the Court. I write separately to make clear that it is not my view, and I do not understand the Court to hold, that no procedural provision can be jurisdictional. It assuredly is within the power of Congress to condition its waiver of sovereign immunity upon strict compliance with procedural provisions attached to the waiver, with the result that failure to comply will deprive a court of

---

U. S. 273, 287 (1983). But cf. *Honda* v. *Clark*, 386 U. S. 484 (1967) (Trading with Enemy Act § 34(f) provided a 60-day claim-filing limitation; Court applied traditional equitable tolling principles to preserve petitioners' cause of action where similar suit was filed within 60-day limitation).

[25] See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950) (to qualify as adequate, notice generally must "apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). See also Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1134 (1966) (recognizing notice as a matter separate from bases of adjudicatory jurisdiction); 4 Wright & Miller, *supra*, § 1063, at 225 (same).

jurisdiction. For the reasons stated by the Court, I do not think that the legislative scheme here makes the "forthwith" service requirement such a condition.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

The Suits in Admiralty Act (SAA or Act) entitles the United States to be served with process "forthwith" in all admiralty proceedings brought under the Act. As a statutory condition on the Government's waiver of its immunity, this time restriction on service demands strict compliance and delimits the district court's jurisdiction to entertain suits in admiralty against the United States. The majority's conclusion that this requirement is supplanted by former Federal Rule of Civil Procedure 4(j) (now Rule 4(m)) rests on a misreading of the SAA and is irreconcilable with our sovereign immunity jurisprudence. Because I believe that Congress intended to restrict admiralty suits against the United States to those cases in which the United States receives service of process forthwith, I respectfully dissent.

As a sovereign, the United States "is immune from suit save as it consents to be sued." *United States* v. *Sherwood,* 312 U. S. 584, 586 (1941). "A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block* v. *North Dakota ex rel. Board of Univ. and School Lands,* 461 U. S. 273, 287 (1983). See also *Lehman* v. *Nakshian,* 453 U. S. 156, 160–161 (1981) ("Like a waiver of [sovereign] immunity itself, which must be 'unequivocally expressed,' 'this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied'" (citations omitted)). The fact that the condition involves a matter of procedure does not affect the analysis, for "in many cases this Court has read procedural rules embodied in statutes waiving immunity strictly, with an eye to effectuating a restrictive legislative purpose when Congress relinquishes sovereign immunity." *Honda* v. *Clark,* 386 U. S. 484, 501 (1967).

As always, the starting point in interpreting the extent of a waiver of sovereign immunity is the text of the statute. Section 2 of the Act contains the actual waiver. It provides that "[i]n cases where if [a] vessel [of the United States] were privately owned or operated, or if . . . cargo [of the United States] were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States." 46 U. S. C. App. § 742. Section 2 also contains the service provision at issue in this case, which states that a plaintiff suing the United States in admiralty "shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States." *Ibid.* Section 3 of the Act, aptly titled "Procedure in cases of libel in personam," provides that suits under the SAA "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." § 743.

The text and structure of the SAA lead me to conclude that Congress intended to allow admiralty suits to proceed against the United States only in cases in which process is served "forthwith." The key to understanding the scheme enacted by Congress lies not so much in Congress' decision to place this service requirement in § 2 as in its decision *not* to address service of process in § 3; for this reason, the majority's sentence-by-sentence analysis of § 2, see *ante,* at 665–668, is largely beside the point. Section 3 provides that the ordinary rules of procedure governing private parties in admiralty also govern suits under the SAA. But Congress excepted from this provision the service-of-process requirement and placed it in a separate section altogether. This suggests not only that Congress attached greater significance to the requirement that process be served forthwith than to other procedural rules, but, more importantly, that Congress expected process to be served forthwith in SAA cases regardless of the "principles of law and . . . rules of practice obtaining in like cases between private parties." 46 U. S. C. App. § 743.

Even were I not convinced that the SAA's requirement of prompt service is a condition on the Government's waiver of sovereign immunity, I still could not agree with the majority that it clearly is *not* a condition on the waiver. At best, the SAA is ambiguous on this point, and when interpreting the breadth of a waiver of sovereign immunity, ambiguity must always be resolved in favor of the Government. See *United States* v. *Williams*, 514 U. S. 527, 531 (1995). We have consistently reaffirmed "the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires." *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 34 (1992) (citations and internal quotation marks omitted). See also *Library of Congress* v. *Shaw*, 478 U. S. 310, 318 (1986). It is at least plausible to interpret the SAA's service provision as a condition on the waiver, and that is enough to justify construing the statute in the Government's favor. Cf. *Nordic Village*, *supra*, at 37.

Because the SAA's service requirement is best read as a condition on the Government's waiver of sovereign immunity, it necessarily follows that this requirement cannot be superseded by a Federal Rule of Civil Procedure. Sovereign immunity is by nature jurisdictional, *FDIC* v. *Meyer*, 510 U. S. 471, 475 (1994), and the terms of the United States' "'consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Ibid.* (quoting *Sherwood,* 312 U. S., at 586). Though the Rules Enabling Act provides that all previously enacted laws that are "in conflict with" the Federal Rules of Civil Procedure "shall be of no further force or effect," 28 U. S. C. § 2072(b), it also expressly provides that the Federal Rules "shall not abridge, enlarge or modify any substantive right," *ibid.* Allowing SAA claims in which process is not served forthwith to proceed against the United States infringes upon the Government's immunity and thereby alters a substantive right in direct contravention of the Rules Enabling Act. Moreover, Federal Rule of Civil Procedure 82 makes clear that the Rules of Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts." Given the jurisdictional nature of a waiver of sovereign immunity, allowing this suit to proceed also violates Rule 82.

I do not mean to imply that ordinary procedural rules automatically become jurisdictional prerequisites in civil cases simply because the United States is a defendant; they do not. But Congress certainly has the power to impose a procedural requirement as a condition on a waiver of sovereign immunity and to require strict compliance with that condition as a prerequisite to invoking or maintaining the court's jurisdiction. The text and structure of the SAA demonstrate that Congress exercised this power when it enacted the SAA, and "nothing in the . . . rules of civil practice so far as they may be applicable in suits brought in district courts [against the Government] authorizes the maintenance of any suit against the United States to which it has not otherwise consented." *Sherwood, supra,* at 589.[1]

---

[1] For instance, in *United States* v. *Sherwood,* 312 U. S. 584 (1941), we held that the possibility of joinder under the liberal joinder provisions of the Federal Rules does not authorize a district court to hear a claim brought against the Government for breach of contract by a party not specifically authorized to bring suit against the United States under the Tucker Act. Notwithstanding the possibility of joinder in a similar case

The majority rejects the proposition, accepted by four of the five Courts of Appeals that have addressed this issue, that a service requirement can serve as a condition on a waiver of sovereign immunity.[2] This cannot be, the majority concludes, because service is "not sensibly typed 'substantive' or 'jurisdictional,'" and instead has a "'procedural' cast" and "deal[s] with case processing." *Ante*, at 667–668. But the proper inquiry is not whether the condition is in nature "procedural" or "substantive," for we have long maintained that even procedural rules can condition a waiver of sovereign immunity. See *Honda*, 386 U. S., at 501. The fact that Congress has determined to limit the scope of its consent to suit is sufficient to restrict federal-court jurisdiction over the United States, regardless of the nature of the condition Congress has attached. For instance, though no one would claim that failure to satisfy a statute of limitations in a case between private parties would serve as a jurisdictional bar to the plaintiff's suit, we have long held that a statute of limitations attached to a waiver of sovereign immunity functions as a condition on the waiver and defines the limits of the district court's jurisdiction to hear a claim against the United States. See *Williams*, 514 U. S., at 534, n. 7; *Block*, 461 U. S., at 287; *United States* v. *Kubrick*, 444 U. S. 111, 117–118 (1979); *Soriano* v. *United States*, 352 U. S. 270, 271, 273 (1957). See generally 14 C. Wright,

---

between private parties, we explained that "[t]he matter [was] not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued," and held that the Government's consent to suit "may be conditioned . . . on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government." *Id.*, at 591.

[2] See *United States* v. *Holmberg*, 19 F. 3d 1062 (CA5), cert. denied, 513 U. S. 986 (1994); *Libby* v. *United States*, 840 F. 2d 818 (CA11 1988); *Amella* v. *United States*, 732 F. 2d 711 (CA9 1984); *Battaglia* v. *United States*, 303 F. 2d 683 (CA2), cert. dism'd, 371 U. S. 907 (1962). Only one Circuit has gone the other way. See *Jones & Laughlin Steel, Inc.* v. *Mon River Towing, Inc.*, 772 F. 2d 62 (CA3 1985).

A. Miller, & E. Cooper, Federal Practice and Procedure §3654, pp. 194–199 (1985).[3] The same is true of the SAA's service requirement. While service of process in a case between private parties may generally be understood to be "a matter discrete from a court's jurisdiction to adjudicate a controversy of a particular kind," *ante*, at 671, a waiver of sovereign immunity conditioned upon a particular method of service would transform what is ordinarily a nonjurisdictional rule into a jurisdictional one.[4]

Once the majority concludes that Congress attached no particular significance to the SAA's requirement that process be served forthwith, the conclusion that Rule 4(j), by operation of the Rules Enabling Act, displaces §2's service requirement would appear to flow naturally. But that is not the case. As the Government concedes, the Rules Enabling

---

[3] Although we held in *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95–96 (1990), that statutes of limitations in cases brought against the Government are presumptively subject to equitable tolling, we also reaffirmed in that case that a time restriction on suit against the United States "is a condition to the waiver of sovereign immunity and thus must be strictly construed." *Id.*, at 94. *Irwin* did mark a departure from our earlier, and stricter, treatment of statutes of limitations in the sovereign immunity context, but our decision in *United States* v. *Williams*, 514 U. S. 527 (1995), makes clear that statutes of limitations in suits brought against the United States are no less jurisdictional prerequisites than they were before *Irwin*. *Williams* confirmed that a statute of limitations "narrow[s] the waiver of sovereign immunity," 514 U. S., at 534, n. 7, and cited for this proposition *United States* v. *Dalm*, 494 U. S. 596 (1990), which held that failure to file a claim against the Government for a federal tax refund within the statute of limitations operates as a jurisdictional bar to suit.

[4] I recognize that, under my reading of the Act, jurisdiction in an SAA suit may turn upon the plaintiff's use of registered mail, which is also specified in the sentence of §2 that requires process to be served forthwith. 46 U. S. C. App. §742. Though this may seem like an odd requirement from our modern perspective, the most sensible textual reading of the Act is still that Congress sought to impose a specific method of service in SAA cases without regard to the rules governing service generally. Congress is free to amend the statute if it determines that the SAA has fallen out of date with modern mailing practices.

Act is "technically inapplicable" in this case, Brief for United States 16, n. 14, because Rule 4(j) was not promulgated by this Court but rather was enacted by Congress, see Pub. L. 97–462, 96 Stat. 2528, and the Rules Enabling Act by its terms nullifies only statutory rules of procedure that conflict with rules promulgated *by the Supreme Court.*

The majority acknowledges the inapplicability of the Rules Enabling Act, *ante,* at 668, but appears to apply the Act nonetheless, *ante,* at 669–670 (citing 28 U. S. C. § 2072(b)). The majority is not entirely clear on this point, however, and it appears that the majority may instead find that Rule 4(j) effected an implied repeal of § 2's service requirement independent of the Rules Enabling Act. See *ante,* at 668 ("[A] Rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes"). The majority may mean by this statement only that the Rules Enabling Act pertains equally to Rules of Procedure promulgated by this Court *and* by Congress, but I am reluctant to assume, absent clearer indication, the Court's reliance on a method of statutory construction that allows us to rewrite a statute when the text does not address the specific situation before us or when it does not generate an outcome that we desire. Regardless of the rubric under which this case is actually decided, the Court, in my opinion, reaches the wrong conclusion. In contrast to the rest of the procedures that apply in SAA cases, the Act requires a specific method of service even though the procedures that govern similar cases may differ. This, in combination with the critical fact that this case involves a waiver of sovereign immunity, leads me to conclude that Rule 4(j) does not displace the service requirement of § 2 either under the Rules Enabling Act or as an implied repeal.

The only question remaining is whether Henderson served his complaint on the United States "forthwith." There is no reasonable argument that he did. Henderson served his complaint on the United States Attorney 148 days after he filed it in the District Court. Although we have never undertaken to define "forthwith" as it is used in the SAA, it is clear that the term "connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella* v. *United States*, 732 F. 2d 711, 713 (CA9 1984) (citing Black's Law Dictionary 588 (5th ed. 1979)). See also *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 192–193 (1900). Whatever problems Henderson may have had in serving his complaint upon the United States, the 148-day delay can hardly be described as process served forthwith under even the most generous definition of the term. I respectfully dissent.

DOCTOR'S ASSOCIATES, INC., ET AL. *v.* CASAROTTO ET UX.

CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 95–559. Argued April 16, 1996—Decided May 20, 1996

When a dispute arose between parties to a standard form franchise agreement for the operation of a Subway sandwich shop in Montana, respondent franchisee sued petitioners, franchisor Doctor's Associates, Inc. (DAI), and its agent, Lombardi, in a Montana state court. The court stayed the lawsuit pending arbitration pursuant to the arbitration clause set out in ordinary type on page nine of the franchise agreement. The Montana Supreme Court reversed, holding that the arbitration clause was unenforceable because it did not meet the state-law requirement that "[n]otice that a contract is subject to arbitration" be "typed in underlined capital letters on the first page of the contract." Mont. Code Ann. § 27–5–114(4). DAI and Lombardi unsuccessfully argued that § 27–5–114(4) was preempted by § 2 of the Federal Arbitration Act (FAA), which declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In arguing for preemption, DAI and Lombardi dominantly relied on *Southland Corp.* v. *Keating,* 465 U. S. 1, and *Perry* v. *Thomas,* 482 U. S. 483, in which this Court established that "state law . . . is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," but not if the state-law principle "takes its meaning precisely from the fact that a contract to arbitrate is at issue." *Id.,* at 493, n. 9 (emphasis added). The Montana Supreme Court, however, thought *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.,* 489 U. S. 468, limited § 2's preemptive force and correspondingly qualified *Southland* and *Perry;* the proper inquiry, the Montana Supreme Court said, should focus not on the bare words of § 2 but on the question: Would the application of § 27–5–114(4)'s notice requirement undermine the FAA's goals and policies. In the Montana court's judgment, the notice requirement did not undermine these goals and policies, for it did not preclude arbitration agreements altogether. On remand from this Court for reconsideration in light of *Allied-Bruce Terminix Cos.* v. *Dobson,* 513 U. S. 265, the Montana court adhered to its original ruling.

Held: Montana's first-page notice requirement, which governs not "any contract," but specifically and solely contracts "subject to arbitration," conflicts with the FAA and is therefore displaced by the federal measure. Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening §2, see, *e. g., Allied-Bruce,* 513 U. S., at 281, but courts may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions, see, *e. g., ibid.* By enacting §2, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts. *Scherk* v. *Alberto-Culver Co.,* 417 U. S. 506, 511. Montana's §27–5–114(4) directly conflicts with §2 because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The Montana Supreme Court misread *Volt* in reaching a contrary conclusion. The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself. Applying §27–5–114(4) here, in contrast, would invalidate the arbitration clause. Pp. 686–688.

274 Mont. 3, 901 P. 2d 596, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, *post,* p. 689.

Mark R. Kravitz argued the cause for petitioners. With him on the briefs were *Jeffrey R. Babbin* and *H. Bartow Farr III.*

Lucinda A. Sikes argued the cause for respondents. With her on the brief were *David C. Vladeck, Paul Alan Levy,* and *William C. Watt.**

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns a standard form franchise agreement for the operation of a Subway sandwich shop in Montana.

---

*Briefs of *amici curiae* urging reversal were filed for the American Council of Life Insurance by *Patricia A. Dunn, Stephen J. Goodman,* and *Phillip E. Stano;* for the International Franchise Association et al. by *William J. Fitzpatrick* and *John F. Verhey;* and for Kaiser Foundation Health Plan, Inc., by *Kennedy P. Richardson.*

Deborah M. Zuckerman, Steven S. Zaleznick, and *Patricia Sturdevant* filed a brief for the American Association of Retired Persons et al. as *amici curiae* urging affirmance.

When a dispute arose between parties to the agreement, franchisee Paul Casarotto sued franchisor Doctor's Associates, Inc. (DAI), and DAI's Montana development agent, Nick Lombardi, in a Montana state court. DAI and Lombardi sought to stop the litigation pending arbitration pursuant to the arbitration clause set out on page nine of the franchise agreement.

The Federal Arbitration Act (FAA or Act) declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2. Montana law, however, declares an arbitration clause unenforceable unless "[n]otice that [the] contract is subject to arbitration" is "typed in underlined capital letters on the first page of the contract." Mont. Code Ann. § 27–5–114(4) (1995). The question here presented is whether Montana's law is compatible with the federal Act. We hold that Montana's first-page notice requirement, which governs not "any contract," but specifically and solely contracts "subject to arbitration," conflicts with the FAA and is therefore displaced by the federal measure.

I

Petitioner DAI is the national franchisor of Subway sandwich shops. In April 1988, DAI entered a franchise agreement with respondent Paul Casarotto, which permitted Casarotto to open a Subway shop in Great Falls, Montana. The franchise agreement stated, on page nine and in ordinary type: "Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration . . . ." App. 75.

In October 1992, Casarotto sued DAI and its agent, Nick Lombardi, in Montana state court, alleging state-law contract and tort claims relating to the franchise agreement. DAI demanded arbitration of those claims, and successfully moved in the Montana trial court to stay the lawsuit pending arbitration. *Id.*, at 10–11.

The Montana Supreme Court reversed. *Casarotto* v. *Lombardi,* 268 Mont. 369, 886 P. 2d 931 (1994). That court left undisturbed the trial court's findings that the franchise agreement fell within the scope of the FAA and covered the claims Casarotto stated against DAI and Lombardi. The Montana Supreme Court held, however, that Mont. Code Ann. § 27–5–114(4) rendered the agreement's arbitration clause unenforceable. The Montana statute provides:

> "Notice that a contract is subject to arbitration . . . shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration."

Notice of the arbitration clause in the franchise agreement did not appear on the first page of the contract. Nor was anything relating to the clause typed in underlined capital letters. Because the State's statutory notice requirement had not been met, the Montana Supreme Court declared the parties' dispute "not subject to arbitration." 268 Mont., at 382, 886 P. 2d, at 939.

DAI and Lombardi unsuccessfully argued before the Montana Supreme Court that § 27–5–114(4) was preempted by § 2 of the FAA.[1] DAI and Lombardi dominantly relied on our decisions in *Southland Corp.* v. *Keating,* 465 U. S. 1 (1984), and *Perry* v. *Thomas,* 482 U. S. 483 (1987). In *Southland,* we held that § 2 of the FAA applies in state as well as federal courts, see 465 U. S., at 12, and "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," *id.,* at 10. We noted in the pathmarking *South-*

---

[1] Section 2 provides, in relevant part:

"A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2.

land decision that the FAA established a "broad principle of enforceability," *id.*, at 11, and that § 2 of the federal Act provided for revocation of arbitration agreements only upon "grounds as exist at law or in equity for the revocation of any contract." In *Perry*, we reiterated: "[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2]." 482 U. S., at 493, n. 9.

The Montana Supreme Court, however, read our decision in *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468 (1989), as limiting the preemptive force of § 2 and correspondingly qualifying *Southland* and *Perry.* 268 Mont., at 378–381, 886 P. 2d, at 937–939. As the Montana Supreme Court comprehended *Volt*, the proper inquiry here should focus not on the bare words of § 2, but on this question: Would the application of Montana's notice requirement, contained in § 27–5–114(4), "undermine the goals and policies of the FAA." 268 Mont., at 381, 886 P. 2d, at 938 (internal quotation marks omitted). Section 27–5–114(4), in the Montana court's judgment, did not undermine the goals and policies of the FAA, for the notice requirement did not preclude arbitration agreements altogether; it simply prescribed "that before arbitration agreements are enforceable, they be entered knowingly." *Id.*, at 381, 886 P. 2d, at 939.

DAI and Lombardi petitioned for certiorari. Last Term, we granted their petition, vacated the judgment of the Montana Supreme Court, and remanded for further consideration in light of *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265 (1995). See 515 U. S. 1129 (1995). In *Allied-Bruce*, we restated what our decisions in *Southland* and *Perry* had established:

> "States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U. S. C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent." 513 U. S., at 281.

On remand, without inviting or permitting further briefing or oral argument,[2] the Montana Supreme Court adhered to its original ruling. The court stated: "After careful review, we can find nothing in the *[Allied-Bruce]* decision which relates to the issues presented to this Court in this case." *Casarotto* v. *Lombardi*, 274 Mont. 3, 7, 901 P. 2d 596, 598 (1995). Elaborating, the Montana court said it found "no suggestion in *[Allied-Bruce]* that the principles from *Volt* on which we relied [to uphold § 27-5-114(4)] have been modified in any way." *Id.*, at 8, 901 P. 2d, at 598-599. We again granted certiorari, 516 U. S. 1036 (1996), and now reverse.

II

Section 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U. S. C. § 2 (emphasis added). Repeating our observation in *Perry*, the text of § 2 declares that state law may be applied "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." 482 U. S., at 493, n. 9. Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. See *Allied-Bruce*, 513 U. S., at 281; *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 483–484 (1989); *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 226 (1987).

---

[2] Dissenting Justice Gray thought it "cavalier" of her colleagues to ignore the defendants' request for an "opportunity to brief the issues raised by the . . . remand and to present oral argument." *Casarotto* v. *Lombardi*, 274 Mont. 3, 9-10, 901 P. 2d 596, 599-600 (1995).

Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. See *Allied-Bruce*, 513 U. S., at 281; *Perry*, 482 U. S., at 493, n. 9. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed "upon the same footing as other contracts." *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 511 (1974) (internal quotation marks omitted). Montana's § 27–5–114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act. See 2 I. Macneil, R. Speidel, T. Stipanowich, & G. Shell, Federal Arbitration Law § 19.1.1, pp. 19:4–19:5 (1995) (under *Southland* and *Perry*, "state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted").[3]

---

[3] At oral argument, counsel for Casarotto urged a broader view, under which § 27–5–114(4) might be regarded as harmless surplus. See Tr. of Oral Arg. 29–32. Montana could have invalidated the arbitration clause in the franchise agreement under general, informed consent principles, counsel suggested. She asked us to regard § 27–5–114(4) as but one illustration of a cross-the-board rule: Unexpected provisions in adhesion contracts must be conspicuous. See also Brief for Respondents 21–24. But the Montana Supreme Court announced no such sweeping rule. The court did not assert as a basis for its decision a generally applicable principle of "reasonable expectations" governing any standard form contract

The Montana Supreme Court misread our *Volt* decision and therefore reached a conclusion in this case at odds with our rulings. *Volt* involved an arbitration agreement that incorporated state procedural rules, one of which, on the facts of that case, called for arbitration to be stayed pending the resolution of a related judicial proceeding. The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself. We held that applying the state rule would not "undermine the goals and policies of the FAA," 489 U. S., at 478, because the very purpose of the Act was to "ensur[e] that private agreements to arbitrate are enforced according to their terms," *id.*, at 479.

Applying § 27–5–114(4) here, in contrast, would not enforce the arbitration clause in the contract between DAI and Casarotto; instead, Montana's first-page notice requirement would invalidate the clause. The "goals and policies" of the FAA, this Court's precedent indicates, are antithetical to threshold limitations placed specifically and solely on arbitration provisions. Section 2 "mandate[s] the enforcement of arbitration agreements," *Southland*, 465 U. S., at 10, "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U. S. C. § 2. Section 27–5–114(4) of Montana's law places arbitration agreements in a class apart from "any contract," and singularly limits their validity. The State's prescription is thus inconsonant with, and is therefore preempted by, the federal law.

---

term. Cf. *Transamerica Ins. Co.* v. *Royle*, 202 Mont. 173, 180, 656 P. 2d 820, 824 (1983) (invalidating provision in auto insurance policy that did not "honor the reasonable expectations" of the insured). Montana's decision trains on and upholds a particular statute, one setting out a precise, arbitration-specific limitation. We review that disposition, and no other. It bears reiteration, however, that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." *Perry* v. *Thomas*, 482 U. S. 483, 493, n. 9 (1987).

* * *

For the reasons stated, the judgment of the Supreme Court of Montana is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, dissenting.

For the reasons given in my dissent last Term in *Allied-Bruce Terminix Cos.* v. *Dobson,* 513 U. S. 265 (1995), I remain of the view that §2 of the Federal Arbitration Act, 9 U. S. C. §2, does not apply to proceedings in state courts. Accordingly, I respectfully dissent.

ORNELAS ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 95–5257. Argued March 26, 1996—Decided May 28, 1996

In denying petitioners' motion to suppress cocaine found in their car, the District Court ruled that the police had reasonable suspicion to stop and question petitioners, and probable cause to remove one of the interior panels where a package containing the cocaine was found. The Court of Appeals ultimately affirmed both determinations, reviewing each "deferentially," and "for clear error," and finding no clear error in either instance.

Held: The ultimate questions of reasonable suspicion to stop and probable cause to make a warrantless search should be reviewed *de novo.* The principal components of either inquiry are (1) a determination of the historical facts leading up to the stop or search, and (2) a decision on the mixed question of law and fact whether the historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. Independent appellate review of the latter determination is consistent with the position taken by this Court, see, *e. g., Brinegar* v. *United States,* 338 U. S. 160; will prevent unacceptably varied results based on the interpretation of similar facts by different trial judges, see *id.,* at 171; is necessary if appellate courts are to maintain control of, and to clarify, the pertinent legal rules, see *Miller* v. *Fenton,* 474 U. S. 104, 114; and will tend to unify precedent and to provide police with a defined set of rules which, in most instances, will make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement, see, *e. g., New York* v. *Belton,* 453 U. S. 454, 458. However, a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn therefrom by resident judges, who view such facts in light of the community's distinctive features and events, and by local police, who view the facts through the lens of their experience and expertise. Pp. 695–700.

16 F. 3d 714 and 52 F. 3d 328, vacated and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, *post,* p. 700.

Robert G. LeBell argued the cause for petitioners. With him on the briefs was *Brian W. Gleason.*

Cornelia T. L. Pillard argued the cause for the United States. With her on the brief were *Solicitor General Days, Acting Assistant Attorney General Keeney, Deputy Solicitor General Dreeben,* and *Joel M. Gershowitz.*

Peter D. Isakoff, by invitation of the Court, 516 U. S. 1008, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners each pleaded guilty to possession of cocaine with intent to distribute. They reserved their right to appeal the District Court's denial of their motion to suppress the cocaine found in their car. The District Court had found reasonable suspicion to stop and question petitioners as they entered their car, and probable cause to remove one of the interior panels where a package containing two kilograms of cocaine was found. The Court of Appeals opined that the findings of reasonable suspicion to stop, and probable cause to search, should be reviewed "deferentially," and "for clear error." We hold that the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed *de novo.*

The facts are not disputed. In the early morning of a December day in 1992, Detective Michael Pautz, a 20-year veteran of the Milwaukee County Sheriff's Department with 2 years specializing in drug enforcement, was conducting drug-interdiction surveillance in downtown Milwaukee.

**Tracey Maclin, Steven R. Shapiro,* and *Barbara E. Bergman* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Fred E. Inbau, Wayne W. Schmidt, James P. Manak, and *Bernard J. Farber* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging affirmance.

Pautz noticed a 1981 two-door Oldsmobile with California license plates in a motel parking lot. The car attracted Pautz's attention for two reasons: because older model, two-door General Motors cars are a favorite with drug couriers because it is easy to hide things in them; and because California is a "source State" for drugs. Detective Pautz radioed his dispatcher to inquire about the car's registration. The dispatcher informed Pautz that the owner was either Miguel Ledesma Ornelas or Miguel Ornelas Ledesma from San Jose, California; Pautz was unsure which name the dispatcher gave. Detective Pautz checked the motel registry and learned that an Ismael Ornelas accompanied by a second man had registered at 4 a.m., without reservations.

Pautz called for his partner, Donald Hurrle, a detective with approximately 25 years of law enforcement experience, assigned for the past 6 years to the drug enforcement unit. When Hurrle arrived at the scene, the officers contacted the local office of the Drug Enforcement Administration (DEA) and asked DEA personnel to run the names Miguel Ledesma Ornelas and Ismael Ornelas through the Narcotics and Dangerous Drugs Information System (NADDIS), a federal database of known and suspected drug traffickers. Both names appeared in NADDIS. The NADDIS report identified Miguel Ledesma Ornelas as a heroin dealer from El Centro, California, and Ismael Ornelas, Jr., as a cocaine dealer from Tucson, Arizona. The officers then summoned Deputy Luedke and the department's drug-sniffing dog, Merlin. Upon their arrival, Detective Pautz left for another assignment. Detective Hurrle informed Luedke of what they knew and together they waited.

Sometime later, petitioners emerged from the motel and got into the Oldsmobile. Detective Hurrle approached the car, identified himself as a police officer, and inquired whether they had any illegal drugs or contraband. Petitioners answered "No." Hurrle then asked for identification and was given two California driver's licenses bearing the names

Saul Ornelas and Ismael Ornelas. Hurrle asked them if he could search the car and petitioners consented. The men appeared calm, but Ismael was shaking somewhat. Deputy Luedke, who over the past nine years had searched approximately 2,000 cars for narcotics, searched the Oldsmobile's interior. He noticed that a panel above the right rear passenger armrest felt somewhat loose and suspected that the panel might have been removed and contraband hidden inside. Luedke would testify later that a screw in the doorjam adjacent to the loose panel was rusty, which to him meant that the screw had been removed at some time. Luedke dismantled the panel and discovered two kilograms of cocaine. Petitioners were arrested.

Petitioners filed pretrial motions to suppress, alleging that the police officers violated their Fourth Amendment rights when the officers detained them in the parking lot and when Deputy Luedke searched inside the panel without a warrant.[1] The Government conceded in the court below that when the officers approached petitioners in the parking lot, a reasonable person would not have felt free to leave, so the encounter was an investigatory stop. See 16 F. 3d 714, 716 (CA7 1994). An investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion, *Terry* v. *Ohio*, 392 U. S. 1 (1968), and a warrantless search of a car is valid if based on probable cause, *California* v. *Acevedo*, 500 U. S. 565, 569–570 (1991).

---

[1] Petitioners also alleged that they had not given their consent to search the interior of the car. The Magistrate Judge rejected this claim, finding that the record "clearly establishe[d] consent to search the Oldsmobile" and that "neither [petitioner] placed any restrictions on the areas the officers could search." App. 21. The Magistrate ruled that this consent did not give the officers authority to search inside the panel, however, because under Seventh Circuit precedent the police may not dismantle the car body during an otherwise valid search unless the police have probable cause to believe the car's panels contain narcotics. See *United States* v. *Garcia*, 897 F. 2d 1413, 1419–1420 (1990). We assume correct the Circuit's limitation on the scope of consent only for purposes of this decision.

After conducting an evidentiary hearing, the Magistrate Judge concluded that the circumstances gave the officers reasonable suspicion, but not probable cause. The Magistrate found, as a finding of fact, that there was no rust on the screw and hence concluded that Deputy Luedke had an insufficient basis to conclude that drugs would be found within the panel. The Magistrate nonetheless recommended that the District Court deny the suppression motions because he thought, given the presence of the drug-sniffing dog, that the officers would have found the cocaine by lawful means eventually and therefore the drugs were admissible under the inevitable discovery doctrine. See *Nix* v. *Williams*, 467 U. S. 431 (1984).

The District Court adopted the Magistrate's recommendation with respect to reasonable suspicion, but not its reasoning as to probable cause. The District Court thought that the model, age, and source-State origin of the car, and the fact that two men traveling together checked into a motel at 4 o'clock in the morning without reservations, formed a drug-courier profile and that this profile together with the NADDIS reports gave rise to reasonable suspicion of drug-trafficking activity; in the court's view, reasonable suspicion became probable cause when Deputy Luedke found the loose panel. Accordingly, the court ruled that the cocaine need not be excluded.[2]

The Court of Appeals reviewed deferentially the District Court's determinations of reasonable suspicion and probable cause; it would reverse only upon a finding of "clear error."[3]

---

[2] The District Court emphasized twice that it did not reject the Magistrate's recommendation with respect to the inevitable discovery doctrine. App. 30–31, and n. 2; *id.*, at 43–44. But on appeal the Government did not defend the seizure on this alternative ground and the Seventh Circuit considered the argument waived. *Id.*, at 71–72.

[3] While the Seventh Circuit uses the term "clear error" to denote the deferential standard applied when reviewing determinations of reasonable suspicion or probable cause, we think the preferable term is "abuse of discretion." See *Pierce* v. *Underwood*, 487 U. S. 552, 558 (1988). "Clear

16 F. 3d, at 719. The court found no clear error in the reasonable-suspicion analysis and affirmed that determination. *Ibid.* With respect to the probable-cause finding, however, the court remanded the case for a determination on whether Luedke was credible when testifying about the loose panel. *Id.*, at 721–722.

On remand, the Magistrate Judge expressly found the testimony credible. The District Court accepted the finding, and once again ruled that probable cause supported the search. The Seventh Circuit held that determination not clearly erroneous. Judgt. order reported at 52 F. 3d 328 (1995).

We granted certiorari to resolve the conflict among the Circuits over the applicable standard of appellate review. 516 U. S. 963 (1996).[4]

Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, nontechnical conceptions that deal with " 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Illinois* v. *Gates*, 462 U. S. 213, 231 (1983) (quoting *Brinegar* v. *United States*, 338 U. S. 160, 175 (1949)); see *United States* v. *Sokolow*, 490 U. S. 1, 7–8 (1989). As such, the standards are "not readily, or even usefully, reduced to a neat set of legal

---

error" is a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure, and applies when reviewing questions of fact.

[4] Compare, *e. g.*, *United States* v. *Puerta*, 982 F. 2d 1297, 1300 (CA9 1992) (*de novo* review); *United States* v. *Ramos*, 933 F. 2d 968, 972 (CA11 1991) (same), cert. denied, 503 U. S. 908 (1992); *United States* v. *Patrick*, 899 F. 2d 169, 171 (CA2 1990) (same), with *United States* v. *Spears*, 965 F. 2d 262, 268–271 (CA7 1992) (clear error).

The United States, in accord with petitioners, contends that a *de novo* standard of review should apply to determinations of probable cause and reasonable suspicion. We therefore invited Peter D. Isakoff to brief and argue this case as *amicus curiae* in support of the judgment below. 516 U. S. 1008 (1996). Mr. Isakoff accepted the appointment and has well fulfilled his assigned responsibility.

rules." *Gates, supra,* at 232. We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity, *United States* v. *Cortez,* 449 U. S. 411, 417–418 (1981), and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found, see *Brinegar, supra,* at 175–176; *Gates, supra,* at 238. We have cautioned that these two legal principles are not "finely-tuned standards," comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. *Gates, supra,* at 235. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed. *Gates, supra,* at 232; *Brinegar, supra,* at 175 ("The standard of proof [for probable cause] is . . . correlative to what must be proved"); *Ker* v. *California,* 374 U. S. 23, 33 (1963) ("This Cour[t] [has a] long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application"; "[e]ach case is to be decided on its own facts and circumstances" (internal quotation marks omitted)); *Terry* v. *Ohio,* 392 U. S., at 29 (the limitations imposed by the Fourth Amendment "will have to be developed in the concrete factual circumstances of individual cases").

The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard* v. *Swint,* 456 U. S. 273, 289, n. 19 (1982).

We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases. We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination. See, *e. g., Brinegar, supra* (rejecting District Court's conclusion that the police lacked probable cause); *Alabama* v. *White,* 496 U. S. 325 (1990) (conducting independent review and finding reasonable suspicion). A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Brinegar, supra,* at 171. Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable.

In addition, the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles. See *Miller* v. *Fenton,* 474 U. S. 104, 114 (1985) (where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law").

Finally, *de novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined " 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" *New York* v. *Belton*, 453 U. S. 454, 458 (1981); see also *Thompson* v. *Keohane*, 516 U. S. 99, 115 (1995) ("[T]he law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law," and those effects "serve legitimate law enforcement interests").

It is true that because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multifaceted, "one determination will seldom be a useful 'precedent' for another," *Gates, supra*, at 238, n. 11. But there are exceptions. For instance, the circumstances in *Brinegar, supra*, and *Carroll* v. *United States*, 267 U. S. 132 (1925), were so alike that we concluded that reversing the Court of Appeals' decision in *Brinegar* was necessary to be faithful to *Carroll*. *Brinegar, supra*, at 178 ("Nor . . . can we find in the present facts any substantial basis for distinguishing this case from the *Carroll* case"). We likewise recognized the similarity of facts in *United States* v. *Sokolow, supra*, and *Florida* v. *Royer*, 460 U. S. 491 (1983) (in both cases, the defendant traveled under an assumed name; paid for an airline ticket in cash with a number of small bills; traveled from Miami, a source city for illicit drugs; and appeared nervous in the airport). The same was true both in *United States* v. *Ross*, 456 U. S. 798 (1982), and *California* v. *Acevedo*, 500 U. S. 565 (1991), see *id.*, at 572 ("The facts in this case closely resemble the facts in *Ross*"); and in *United States* v. *Mendenhall*, 446 U. S. 544 (1980), and *Reid* v. *Georgia*, 448 U. S. 438 (1980), see *id.*, at 443 (Powell, J., concurring) ("facts [in *Mendenhall*] [are] remarkably similar to those in the present case"). And even where one case may not squarely control another one, the two decisions when viewed together may usefully add to the body of law on the subject.

The Court of Appeals, in adopting its deferential standard of review here, reasoned that *de novo* review for warrantless searches would be inconsistent with the "'great deference'" paid when reviewing a decision to issue a warrant, see *Illi-*

nois v. *Gates*, 462 U. S. 213 (1983). See *United States* v. *Spears*, 965 F. 2d 262, 269–271 (CA7 1992). We cannot agree. The Fourth Amendment demonstrates a "strong preference for searches conducted pursuant to a warrant," *Gates, supra*, at 236, and the police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches. Were we to eliminate this distinction, we would eliminate the incentive.

We therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference. For example, what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee. That city is unlikely to have been an overnight stop selected at the last minute by a traveler coming from California to points east. The 85-mile width of Lake Michigan blocks any further eastward progress. And while the city's salubrious summer climate and seasonal attractions bring many tourists at that time of year, the same is not true in December. Milwaukee's average daily high temperature in that month is 31 degrees and its average daily low is 17 degrees; the percentage of possible sunshine is only 38 percent. It is a reasonable inference that a Californian stopping in Milwaukee in December is either there to transact business or to visit family or friends. The background facts, though rarely the subject of explicit findings, inform the judge's assessment of the historical facts.

In a similar vein, our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists. See, *e. g.*, *United States* v. *Ortiz*, 422 U. S. 891, 897 (1975). To a layman the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to Officer Luedke, who had searched roughly 2,000 cars for narcotics, it suggested that drugs may be secreted inside the panel. An appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable.

We vacate the judgments and remand the case to the Court of Appeals to review *de novo* the District Court's determinations that the officer had reasonable suspicion and probable cause in this case.

It is so ordered.

JUSTICE SCALIA, dissenting.

The Court today decides that a district court's determinations whether there was probable cause to justify a warrantless search and reasonable suspicion to make an investigatory stop should be reviewed *de novo*. We have in the past reviewed some mixed questions of law and fact on a *de novo* basis, and others on a deferential basis, depending upon essentially practical considerations. Because, with respect to the questions at issue here, the purpose of the determination and its extremely fact-bound nature will cause *de novo* review to have relatively little benefit, it is in my view unwise to require courts of appeals to undertake the searching inquiry that standard requires. I would affirm the judgment of the Court of Appeals.

As the Court recognizes, determinations of probable cause and reasonable suspicion involve a two-step process. First, a court must identify all of the relevant historical facts known to the officer at the time of the stop or search; and second, it must decide whether, under a standard of objective reasonableness, those facts would give rise to a reasonable suspicion justifying a stop or probable cause to search. See *ante*, at 696–697. Because this second step requires application of an objective legal standard to the facts, it is properly characterized as a mixed question of law and fact. See *ibid.*; *Pullman-Standard* v. *Swint*, 456 U. S. 273, 289, n. 19 (1982).

Merely labeling the issues "mixed questions," however, does not establish that they receive *de novo* review. While it is well settled that appellate courts "accep[t] findings of fact that are not 'clearly erroneous' but decid[e] questions of law *de novo*," *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 948 (1995), there is no rigid rule with respect to mixed questions. We have said that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina College* v. *Russell*, 499 U. S. 225, 233 (1991) (citing *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985)).

These primary factors that counsel in favor of deferential review of some mixed questions of law and fact—expertise of the district court and lack of law-clarifying value in the appellate decision—are ordinarily present with respect to determinations of reasonable suspicion and probable cause. The factual details bearing upon those determinations are often numerous and (even when supported by uncontroverted police testimony) subject to credibility determinations. An appellate court never has the benefit of the district court's intimate familiarity with the details of the case—nor the full benefit of its hearing of the live testimony, unless the district court makes specific findings on the "totality of the circumstances" bearing upon the stop or search.

As we recognized in *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384 (1990), a case holding that deferential (abuse-of-discretion) review should be applied to a district court's Federal Rule of Civil Procedure 11 determination that an attorney did not conduct a reasonable inquiry or entertain a "substantiated belief" regarding the nonfrivolousness of the complaint, see *id.*, at 393: A district court, "[f]amiliar with the issues and litigants . . . is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard . . . ." *Id.*, at 402.

Moreover, as the Court acknowledges, "reasonable suspicion" and "probable cause" are "commonsense, nontechnical conceptions that deal with '"the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."'" *Ante*, at 695 (quoting *Illinois* v. *Gates*, 462 U. S. 213, 231 (1983) (quoting *Brinegar* v. *United States*, 338 U. S. 160, 175 (1949))). Where a trial court makes such commonsense determinations based on the totality of circumstances, it is ordinarily accorded deference. What we said in a case concerning the question whether certain payments were a "gift" excludable from income under the Internal Revenue Code is equally pertinent here.

> "Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the . . . standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact." *Commissioner* v. *Duberstein*, 363 U. S. 278, 289 (1960).

With respect to the second factor counseling in favor of deferential review, level of law-clarifying value in the appellate decision: Law clarification requires generalization, and some issues lend themselves to generalization much more than others. Thus, in *Pierce* v. *Underwood,* 487 U. S. 552, 562 (1988), a principal basis for our applying an abuse-of-discretion standard to a district court's determination that the United States' litigating position was "substantially justified" within the meaning of the Equal Access to Justice Act, 28 U. S. C. § 2412(d), was that the question was "a multifarious and novel question, little susceptible, for the time being at least, of useful generalization." 487 U. S., at 562. Probable-cause and reasonable-suspicion determinations are similarly resistant to generalization. As the Court recognizes, these are "fluid concepts," "'not readily, or even usefully, reduced to a neat set of legal rules'"; and "because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multifaceted, 'one determination will seldom be a useful "precedent" for another.'" *Ante,* at 695–696, 698 (quoting *Illinois* v. *Gates, supra,* at 232, 238, n. 11). The Court maintains that there will be exceptions to this—that fact patterns will occasionally repeat themselves, so that a prior *de novo* appellate decision will provide useful guidance in a similar case. *Ante,* at 698. I do not dispute that, but I do not understand why we should allow the exception to frame the rule. Here, as in *Anderson* v. *Bessemer City,* 470 U. S. 564, 574–575 (1985), "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."

The facts of this very case illustrate the futility of attempting to craft useful precedent from the fact-intensive review demanded by determinations of probable cause and reasonable suspicion. On remand, in conducting *de novo* review, the Seventh Circuit might consider, *inter alia,* the following factors relevant to its determination whether there was probable cause to conduct a warrantless search and reasonable suspicion justifying the investigatory stop: (i) the two NADDIS tips; (ii) that the car was a 1981 two-door General Motors product; (iii) that the car was from California, a source State; (iv) that the car was in Milwaukee; (v) that it was December; (vi) that one suspect checked into the hotel at 4 a.m.; (vii) that he did not have reservations; (viii) that he had one traveling companion; (ix) that one suspect appeared calm but shaking; and (x) that there was a loose panel in the car door. If the Seventh Circuit were to find that this unique confluence of factors supported probable cause and reasonable suspicion, the absence of any one of these factors in the next case would render the precedent inapplicable.

Of course, even when all of the factors *are* replicated, use of a *de novo* standard as opposed to a deferential standard will provide greater clarity only where the latter would not suffice to set the trial court's conclusion aside. For where the appellate court holds, on the basis of deferential review, that it *was* reversible error for a district court to find probable cause or reasonable suspicion in light of certain facts, it advances the clarity of the law just as much as if it had reversed the district court after conducting plenary review.

In the present case, an additional factor counseling against *de novo* review must be mentioned: The prime benefit of *de novo* appellate review in criminal cases is, of course, to prevent a miscarriage of justice that might result from permitting the verdict of guilty to rest upon the legal determinations of a single judge. But the issue in these probable-cause and reasonable-suspicion cases is not innocence but deterrence of unlawful police conduct. That deterrence will not be *at all* lessened if the trial judge's determination, right or wrong, is subjected to only deferential review.

The Court is wrong in its assertion, *ante*, at 698–699, that unless there is a dual standard of review—deferential review of a magistrate's decision to issue a warrant, and *de novo* review of a district court's *ex post facto* approval of a warrantless search—the incentive to obtain a warrant would be eliminated. In *United States* v. *Leon,* 468 U. S. 897, 913 (1984), we held that "reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate . . . should be admissible in the prosecutor's case in chief." Only a warrant can provide this assurance that the fruits of even a technically improper search will be admissible. Law enforcement officers would still have ample incentive to proceed by warrant.

Finally, I must observe that the Court does not appear to have the courage of its conclusions. In an apparent effort to reduce the unproductive burden today's decision imposes upon appellate courts, or perhaps to salvage some of the trial court's superior familiarity with the facts that it has cast aside, the Court suggests that an appellate court should give "due weight" to a trial court's finding that an officer's inference of wrongdoing (*i. e.,* his assessment of probable cause to search) was reasonable. *Ante,* at 700. The Court cannot have it both ways. This finding of "reasonableness" is precisely what it has told us the appellate court must review *de novo;* and in *de novo* review, the "weight due" to a trial court's finding is zero. In the last analysis, therefore, the Court's opinion seems to me not only wrong but contradictory.

* * *

I would affirm the judgment of the Seventh Circuit on the ground that it correctly applied a deferential standard of review to the District Court's findings of probable cause and reasonable suspicion.

QUACKENBUSH, CALIFORNIA INSURANCE COMMISSIONER *v.* ALLSTATE INSURANCE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95–244. Argued February 20, 1996—Decided June 3, 1996

Petitioner California Insurance Commissioner, as trustee over the assets of the Mission Insurance Company and its affiliates, filed a state court action against respondent Allstate Insurance Company, seeking, among other things, contract and tort damages for Allstate's alleged breach of reinsurance agreements. Allstate removed the action to federal court on diversity grounds and filed a motion to compel arbitration under the Federal Arbitration Act. The Commissioner sought remand to state court, arguing that the District Court should abstain from hearing the case under *Burford* v. *Sun Oil Co.*, 319 U. S. 315, because its resolution might interfere with California's regulation of the Mission insolvency. Specifically, the Commissioner indicated that the issue whether Allstate could set off its own contract claims against the Commissioner's recovery was a question of state law currently pending before the state courts in another Mission insolvency case. Observing that the State's overriding interest in the uniform and orderly regulation of insurance insolvencies and liquidations could be undermined by inconsistent rulings from the federal and state courts, and determining that the setoff question should be resolved in state court, the District Court concluded that *Burford* abstention was appropriate and remanded the case to state court without ruling on Allstate's arbitration motion. After determining that appellate review of the District Court's remand order was not barred by 28 U. S. C. § 1447(d), and that the remand order was appealable under 28 U. S. C. § 1291 as a final collateral order, the Ninth Circuit vacated the decision and ordered the case sent to arbitration. Concluding that *Burford* abstention is limited to equitable actions, the court held that abstention was inappropriate in this damages action.

Held:

1. An abstention-based remand order is appealable under 28 U. S. C. § 1291. Section 1447(d)—which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"—interposes no bar to appellate review of the order at issue. Only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d), and the District Court's order in this

case does not fall into either category of remand order described in § 1447(c): It is not based on lack of subject matter jurisdiction or defects in removal procedure. The remand order here falls within that narrow class of collateral orders that are immediately appealable under § 1291. It puts the litigants in this case effectively out of court, and its effect is precisely to surrender jurisdiction of a federal suit to a state court. *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 11, n. 11. The order also conclusively determines an issue that is separate from the merits, namely, the question whether the federal court should decline to exercise its jurisdiction in the interest of comity and federalism; the rights asserted on appeal from the abstention decision are sufficiently important to warrant an immediate appeal; and the remand order will not be subsumed in any other appealable order entered by the District Court. See *Moses H. Cone, supra.* The decision in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 352–353, that "an order remanding a removed action does not represent a final judgment reviewable by appeal," is disavowed to the extent it would require this Court to ignore the implications of the later holding in *Moses H. Cone*. Pp. 711–715.

2. Federal courts have the power to dismiss or remand cases based on abstention principles only where the relief sought is equitable or otherwise discretionary. Because this was a damages action, the District Court's remand order was an unwarranted application of the *Burford* doctrine. Pp. 716–731.

(a) In cases where the relief sought is equitable in nature or otherwise discretionary, federal courts not only have the power to stay the action based on abstention principles, but can also, in otherwise appropriate circumstances, decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court. See, *e. g.*, *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 297. By contrast, federal courts may stay actions for damages based on abstention principles, but those principles do not support the outright dismissal or remand of damages actions. See, *e. g.*, *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25, 28. Pp. 716–723.

(b) *Burford* allows a federal court to dismiss a case only if it presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or if its adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 814. This power to dismiss represents an extraordinary and narrow exception to a district court's duty to adjudicate a controversy properly before it. Pp. 723–728.

(c) Applying *Burford* to this case, the federal interests are pronounced, as Allstate's motion to compel arbitration under the Federal Arbitration Act implicates a substantial federal concern for the enforcement of arbitration agreements. With regard to the state interests, the case appears at first blush to present nothing more than a run-of-the-mill contract dispute: The Commissioner seeks damages for Allstate's failure to perform its obligations under a reinsurance agreement. Pp. 728–730.

(d) To the extent the Ninth Circuit held only that a federal court cannot, under *Burford*, dismiss or remand an action when the relief sought is not discretionary, its judgment is consistent with this Court's abstention cases. The Commissioner appears to have conceded that the relief sought is neither equitable nor otherwise committed to the court's discretion. However, by limiting *Burford* abstention to equitable cases, the court applied a *per se* rule more rigid than this Court's precedents require. Since abstention principles are not completely inapplicable in damages actions, *Burford* might have supported an order to stay the federal proceedings pending the outcome of the state court litigation on the setoff issue. Only the remand order which the Ninth Circuit entered is being reviewed, and, thus, it is not necessary to determine whether a more limited abstention-based stay order would have been warranted on the facts of this case. Pp. 730–731.

47 F. 3d 350, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court. SCALIA, J., *post*, p. 731, and KENNEDY, J., *post*, p. 733, filed concurring opinions.

Karl L. Rubinstein argued the cause for petitioner. With him on the briefs were *Dana Carli Brooks*, *Melissa S. Kooistra*, *William W. Palmer*, and *David L. Shapiro*.

Donald Francis Donovan argued the cause for respondent. With him on the brief were *Carl Micarelli*, *Joseph D. Lee*, and *James G. Sporleder*.*

---

[*] Richard Ruda and *James I. Crowley* filed a brief for the Council of State Governments et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Massachusetts et al. by *Scott Harshbarger*, Attorney General of Massachusetts, and *Thomas W. Rynard;* for the National Association of Independent Insurers et al. by *Charles Platto* and *Phillip Stano;* and for the Reinsurance Association of America et al. by *Maureen E. Mahoney.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case, we consider whether an abstention-based remand order is appealable as a final order under 28 U. S. C. § 1291, and whether the abstention doctrine first recognized in *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943), can be applied in a common-law suit for damages.

I

Petitioner, the Insurance Commissioner for the State of California, was appointed trustee over the assets of the Mission Insurance Company and its affiliates (Mission companies) in 1987, after those companies were ordered into liquidation by a California court. In an effort to gather the assets of the defunct Mission companies, the Commissioner filed the instant action against respondent Allstate Insurance Company in state court, seeking contract and tort damages for Allstate's alleged breach of certain reinsurance agreements, as well as a general declaration of Allstate's obligations under those agreements.

Allstate removed the action to federal court on diversity grounds and filed a motion to compel arbitration under the Federal Arbitration Act, 9 U. S. C. § 1 *et seq.* (1988 ed. and Supp. V). The Commissioner sought remand to state court, arguing that the District Court should abstain from hearing the case under *Burford, supra,* because its resolution might interfere with California's regulation of the Mission insolvency. Specifically, the Commissioner indicated that Allstate would be asserting its right to set off its own contract claims against the Commissioner's recovery under the contract, that the viability of these setoff claims was a hotly disputed question of state law, and that this question was currently pending before the state courts in another case arising out of the Mission insolvency.

The District Court observed that "California has an overriding interest in regulating insurance insolvencies and liquidations in a uniform and orderly manner," and that in this case "this important state interest could be undermined by inconsistent rulings from the federal and state courts." App. to Pet. for Cert. 34a. Based on these observations, and its determination that the setoff question should be resolved in state court, the District Court concluded this case was an appropriate one for the exercise of *Burford* abstention. The District Court did not stay its hand pending the California courts' resolution of the setoff issue, but instead remanded the entire case to state court. The District Court entered this remand order without ruling on Allstate's motion to compel arbitration.

After determining that appellate review of the District Court's remand order was not barred by 28 U. S. C. § 1447(d), see *Garamendi* v. *Allstate Ins. Co.*, 47 F. 3d 350, 352 (CA9 1995) (citing *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336 (1976)), and that the remand order was appealable under 28 U. S. C. § 1291 as a final collateral order, see 47 F. 3d, at 353–354 (citing *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1 (1983)), the Court of Appeals for the Ninth Circuit vacated the District Court's decision and ordered the case sent to arbitration. The Ninth Circuit concluded that federal courts can abstain from hearing a case under *Burford* only when the relief being sought is equitable in nature, and therefore held that abstention was inappropriate in this case because the Commissioner purported to be seeking only legal relief. 47 F. 3d, at 354–356; App. to Pet. for Cert. 35a–37a (order denying petition for rehearing because Commissioner had waived any argument that this case involved a request for equitable relief).

The Ninth Circuit's holding that abstention-based remand orders are appealable conflicts with the decisions of other Courts of Appeals, see *Doughty* v. *Underwriters at Lloyd's, London*, 6 F. 3d 856, 865 (CA1 1993) (order not appealable); *Corcoran* v. *Ardra Insurance Co., Ltd.*, 842 F. 2d 31, 34 (CA2 1988) (same); *In re Burns & Wilcox, Ltd.*, 54 F. 3d 475, 477,

n. 7 (CA8 1995) (same); but see *Minot* v. *Eckardt-Minot,* 13 F. 3d 590, 593 (CA2 1994) (order appealable under collateral order doctrine), as does its determination that *Burford* abstention can only be exercised in cases in which equitable relief is sought, see *Lac D'Amiante du Quebec, Ltee* v. *American Home Assurance Co.,* 864 F. 2d 1033, 1045 (CA3 1988) (*Burford* abstention appropriate in case seeking declaratory relief); *Brandenburg* v. *Seidel,* 859 F. 2d 1179, 1192, n. 17 (CA4 1988) (*Burford* abstention appropriate in action for damages); *Wolfson* v. *Mutual Benefit Life Ins. Co.,* 51 F. 3d 141, 147 (CA8 1995) (same); but see *Fragoso* v. *Lopez,* 991 F. 2d 878, 882 (CA1 1993) (federal court can abstain under *Burford* only if it is "sitting in equity"); *University of Maryland* v. *Peat Marwick Main & Co.,* 923 F. 2d 265, 272 (CA3 1991) (same); *Baltimore Bank for Cooperatives* v. *Farmer's Cheese Cooperative,* 583 F. 2d 104, 111 (CA3 1978) (same). We granted certiorari to resolve these conflicts, 516 U. S. 929 (1995), and now affirm on grounds different from those provided by the Ninth Circuit.

II

We first consider whether the Court of Appeals had jurisdiction to hear Allstate's appeal under 28 U. S. C. § 1291, which confers jurisdiction over appeals from "final decisions" of the district courts, and 28 U. S. C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

We agree with the Ninth Circuit and the parties that § 1447(d) interposes no bar to appellate review of the remand order at issue in this case. See 47 F. 3d, at 352; Brief for Petitioner 29–30; Brief for Respondent 13–14, n. 12. As we held in *Thermtron Products, Inc.* v. *Hermansdorfer, supra,* at 345–346, and reiterated this Term in *Things Remembered, Inc.* v. *Petrarca,* 516 U. S. 124, 127 (1995), "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." This gloss renders § 1447(d) inapplicable here: The District Court's abstention-based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure.

Finding no affirmative bar to appellate review of the District Court's remand order, we must determine whether that review may be obtained by appeal under § 1291. The general rule is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U. S. 863, 868 (1994) (citations omitted). Accordingly, we have held that a decision is ordinarily considered final and appealable under § 1291 only if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U. S. 229, 233 (1945); see also *Digital*, *supra*, at 867 (quoting this standard). We have also recognized, however, a narrow class of collateral orders which do not meet this definition of finality, but which are nevertheless immediately appealable under § 1291 because they " 'conclusively determine [a] disputed question' " that is " 'completely separate from the merits of the action,' " " 'effectively unreviewable on appeal from a final judgment,' " *Richardson-Merrell Inc.* v. *Koller*, 472 U. S. 424, 431 (1985) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978)), and "too important to be denied review," *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949).

The application of these principles to the appealability of the remand order before us is controlled by our decision in *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, *supra*. The District Court in that case entered an order under *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800 (1976), staying a federal diversity suit pending the completion of a declaratory judgment action that had been filed in state court. The Court of Appeals held that this stay order was appealable under § 1291, and we affirmed that determination on two independent grounds.

We first concluded that the abstention-based stay order was appealable as a "final decision" under § 1291 because it put the litigants " 'effectively out of court,' " 460 U. S., at 11, n. 11 (quoting *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U. S. 713, 715, n. 2 (1962) *(per curiam)*), and because its effect was "precisely to surrender jurisdiction of a federal suit to a state court," 460 U. S., at 11, n. 11. These standards do not reflect our oft-repeated definition of finality, see *supra,* at 712 (citing *Catlin, supra,* at 233); see, *e. g., Digital, supra,* at 867 (citing the *Catlin* definition); *Lauro Lines s.r.l.* v. *Chasser,* 490 U. S. 495, 497 (1989) (same); *Van Cauwenberghe* v. *Biard,* 486 U. S. 517, 521–522 (1988) (same), but in *Moses H. Cone* we found their application to be compelled by precedent, see 460 U. S., at 11, n. 11 ("*Idlewild*'s reasoning is limited to cases where (under *Colorado River,* abstention, or a closely similar doctrine) the object of the stay is to require all or an essential part of the federal suit to be litigated in a state forum").

As an alternative to this reliance on *Idlewild,* we also held that the stay order at issue in *Moses H. Cone* was appealable under the collateral order doctrine. 460 U. S., at 11. We determined that a stay order based on the *Colorado River* doctrine "presents an important issue separate from the merits" because it "amounts to a refusal to adjudicate" the case in federal court; that such orders could not be reviewed on appeal from a final judgment in the federal action because the district court would be bound, as a matter of res judicata, to honor the state court's judgment; and that unlike other stay orders, which might readily be reconsidered by the district court, abstention-based stay orders of this ilk are "conclusive" because they are the practical equivalent of an order dismissing the case. 460 U. S., at 12.

The District Court's order remanding on grounds of *Burford* abstention is in all relevant respects indistinguishable from the stay order we found to be appealable in *Moses H. Cone.* No less than an order staying a federal court action pending adjudication of the dispute in state court, it puts the litigants in this case "'effectively out of court,'" *Moses H. Cone, supra,* at 11, n. 11 (quoting *Idlewild Bon Voyage Liquor Corp.* v. *Epstein, supra,* at 715, n. 2), and its effect is "precisely to surrender jurisdiction of a federal suit to a state court," 460 U. S., at 11, n. 11. Indeed, the remand order is clearly more "final" than a stay order in this sense. When a district court remands a case to a state court, the district court disassociates itself from the case entirely, retaining nothing of the matter on the federal court's docket.

The District Court's order is also indistinguishable from the stay order we considered in *Moses H. Cone* in that it conclusively determines an issue that is separate from the merits, namely, the question whether the federal court should decline to exercise its jurisdiction in the interest of comity and federalism. See *infra,* at 716–717, 727–728. In addition, the rights asserted on appeal from the District Court's abstention decision are, in our view, sufficiently important to warrant an immediate appeal. See *infra,* at 716, 723–728 (describing interests weighed in decision to abstain under *Burford*); cf. *Digital,* 511 U. S., at 878 (review under collateral order doctrine limited to those issues "'too important to be denied review'") (quoting *Cohen, supra,* at 546). And, like the stay order we found appealable in *Moses H. Cone,* the District Court's remand order in this case will not be subsumed in any other appealable order entered by the District Court.

We have previously stated that "an order remanding a removed action does not represent a final judgment reviewable by appeal." *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S., at 352–353. Petitioner asks that we adhere to that statement and hold that appellate review of the District

Court's remand order can only be obtained through a petition for writ of mandamus. To the extent *Thermtron* would require us to ignore the implications of our later holding in *Moses H. Cone,* however, we disavow it. *Thermtron*'s determination that remand orders are not reviewable "final judgments" doubtless was necessary to the resolution of that case, see 423 U. S., at 352 (posing the question whether mandamus was the appropriate vehicle), but our principal concern in *Thermtron* was the interpretation of the bar to appellate review embodied in 28 U. S. C. § 1447(d), see *supra,* at 711–712, and our statement concerning the appropriate procedural vehicle for reviewing a district court's remand order was peripheral to that concern. Moreover, the parties in *Thermtron* did not brief the question, our opinion does not refer to *Catlin* or its definition of "final decisions," and our opinion nowhere addresses whether any class of remand order might be appealable under the collateral order doctrine. Indeed, the only support *Thermtron* cites for the proposition that remand orders are reviewable only by mandamus, not by appeal, is *Railroad Co.* v. *Wiswall,* 23 Wall. 507 (1875), the superannuated reasoning of which is of little vitality today, compare *id.,* at 508 (deeming a "writ of error to review what has been done" an inappropriate vehicle for reviewing a court of appeals' "refusal to hear and decide"), with *Moses H. Cone,* 460 U. S., at 10–11, n. 11 (holding that a stay order is appealable *because* it amounts to a refusal to hear and decide a case).

Admittedly, remand orders like the one entered in this case do not meet the traditional definition of finality—they do not "en[d] the litigation on the merits and leav[e] nothing for the court to do but execute the judgment," *Catlin,* 324 U. S., at 233. But because the District Court's remand order is functionally indistinguishable from the stay order we found appealable in *Moses H. Cone,* see *supra,* at 714, we conclude that it is appealable, and turn to the merits of the Ninth Circuit's decision respecting *Burford* abstention.

III

A

We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress. See, *e. g., Colorado River,* 424 U. S., at 821 ("[F]ederal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them'"); *England* v. *Louisiana Bd. of Medical Examiners,* 375 U. S. 411, 415 (1964) ("'When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction'") (quoting *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 40 (1909)); *Cohens* v. *Virginia,* 6 Wheat. 264, 404 (1821) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not"). This duty is not, however, absolute. See *Canada Malting Co.* v. *Paterson S. S., Ltd.,* 285 U. S. 413, 422 (1932) ("[T]he proposition that a court having jurisdiction must exercise it, is not universally true"). Indeed, we have held that federal courts may decline to exercise their jurisdiction, in otherwise "'exceptional circumstances,'" where denying a federal forum would clearly serve an important countervailing interest, *Colorado River, supra,* at 813 (quoting *County of Allegheny* v. *Frank Mashuda Co.,* 360 U. S. 185, 189 (1959)), for example, where abstention is warranted by considerations of "proper constitutional adjudication," "regard for federal-state relations," or "wise judicial administration," *Colorado River, supra,* at 817 (internal quotation marks omitted).

We have thus held that federal courts have the power to refrain from hearing cases that would interfere with a pending state criminal proceeding, see *Younger* v. *Harris,* 401 U. S. 37 (1971), or with certain types of state civil proceedings, see *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592 (1975); *Juidice* v. *Vail,* 430 U. S. 327 (1977); cases in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law, see *Railroad Comm'n of Tex.* v. *Pullman Co.,* 312 U. S. 496 (1941); cases raising issues "intimately involved with [the States'] sovereign prerogative," the proper adjudication of which might be impaired by unsettled questions of state law, see *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25, 28 (1959); *id.*, at 31 (Stewart, J., concurring); cases whose resolution by a federal court might unnecessarily interfere with a state system for the collection of taxes, see *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293 (1943); and cases which are duplicative of a pending state proceeding, see *Colorado River Water Conservation Dist.* v. *United States,* 424 U. S. 800 (1976); *Pennsylvania* v. *Williams,* 294 U. S. 176 (1935).

Our longstanding application of these doctrines reflects "the common-law background against which the statutes conferring jurisdiction were enacted," *New Orleans Public Service, Inc.* v. *Council of City of New Orleans,* 491 U. S. 350, 359 (1989) *(NOPSI)* (citing Shapiro, Jurisdiction and Discretion, 60 N. Y. U. L. Rev. 543, 570–577 (1985)). And, as the Ninth Circuit correctly indicated, 47 F. 3d, at 354, it has long been established that a federal court has the authority to decline to exercise its jurisdiction when it "is asked to employ its historic powers as a court of equity," *Fair Assessment in Real Estate Assn., Inc.* v. *McNary,* 454 U. S. 100, 120 (1981) (Brennan, J., concurring). This tradition informs our understanding of the jurisdiction Congress has conferred upon the federal courts, and explains the development of our abstention doctrines. In *Pullman,* for example, we explained the principle underlying our abstention doctrines as follows:

> ". . . The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction

> with state policies, whether the policy relates to the enforcement of the criminal law, or the administration of a specialized scheme for liquidating embarrassed business enterprises, or the final authority of a state court to interpret doubtful regulatory laws of the state. These cases reflect a doctrine of abstention appropriate to our federal system, whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers." 312 U. S., at 500–501 (citations omitted).

Though we have thus located the power to abstain in the historic discretion exercised by federal courts "sitting in equity," we have not treated abstention as a "technical rule of equity procedure." *Thibodaux, supra,* at 28. Rather, we have recognized that the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief. See *NOPSI, supra,* at 359 (mandate of federal jurisdiction "does not eliminate . . . the federal courts' discretion in determining whether to grant certain types of relief"). Accordingly, we have not limited the application of the abstention doctrines to suits for injunctive relief, but have also required federal courts to decline to exercise jurisdiction over certain classes of declaratory judgments, see, *e. g., Huffman,* 319 U. S., at 297 (federal court must abstain from hearing declaratory judgment action challenging constitutionality of a state tax); *Samuels* v. *Mackell,* 401 U. S. 66, 69–70, 72–73 (1971) (extending *Younger* abstention to declaratory judgment actions), the granting of which is generally committed to the courts' discretion, see *Wilton* v. *Seven Falls Co.,* 515 U. S. 277, 282 (1995) (federal courts have "discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites").

Nevertheless, we have not previously addressed whether the principles underlying our abstention cases would support the remand or dismissal of a common-law action for damages. Cf. *Deakins* v. *Monaghan,* 484 U. S. 193, 202, and n. 6 (1988) (reserving the question whether *Younger* requires abstention in an action for damages); *Ankenbrandt* v. *Richards,* 504 U. S. 689 (1992) (discussing, without applying, *Burford* abstention in damages action). To be sure, we held in *Fair Assessment in Real Estate Assn., Inc.* v. *McNary, supra,* that a federal court should not entertain a 42 U. S. C. § 1983 suit for damages based on the enforcement of a state tax scheme, see 454 U. S., at 115, but we have subsequently indicated that *Fair Assessment* was a case about the scope of the § 1983 cause of action, see *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n,* 515 U. S. 582, 589–590 (1995), not the abstention doctrines. To the extent *Fair Assessment* does apply abstention principles, its holding is very limited. The damages action in that case was based on the unconstitutional application of a state tax law, and the award of damages turned first on a declaration that the state tax was in fact unconstitutional. We therefore drew an analogy to *Huffman* and other cases in which we had approved the application of abstention principles in declaratory judgment actions, and held that the federal court should decline to hear the action because "[t]he recovery of damages under the Civil Rights Act first requires a 'declaration' or determination of the unconstitutionality of a state tax scheme that would halt its operation." *Fair Assessment, supra,* at 115.

Otherwise, we have applied abstention principles to actions "at law" only to permit a federal court to enter a stay order that *postpones* adjudication of the dispute, not to dismiss the federal suit altogether. See, *e. g., Thibodaux, supra,* at 28–30 (approving stay order); *Fornaris* v. *Ridge*

Tool Co., 400 U. S. 41, 44 (1970) *(per curiam)* (directing District Court to "*hold its hand* until the Puerto Rican Supreme Court has authoritatively ruled on the local law question in light of the federal claims" (footnote omitted)) (emphasis added); *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U. S. 134, 135–136 (1962) *(per curiam)* ("Wise judicial administration in this case counsels that decision of the federal question be deferred until the potentially controlling state-law issue is authoritatively put to rest"); *Clay* v. *Sun Ins. Office Ltd.*, 363 U. S. 207, 212 (1960) (approving "postponement of decision" in damages suit).

Our decisions in *Thibodaux* and *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185 (1959), illustrate the distinction we have drawn between abstention-based remand orders or dismissals and abstention-based decisions merely to stay adjudication of a federal suit. In *Thibodaux,* a city in Louisiana brought an eminent domain proceeding in state court, seeking to condemn for public use certain property owned by a Florida corporation. After the corporation removed the action to federal court on diversity grounds, the Federal District Court decided on its own motion to stay the case, pending a state court's determination whether the city could exercise the power of eminent domain under state law. The case did not arise within the "equity" jurisdiction of the federal courts, 360 U. S., at 28, because the suit sought compensation for a taking, and the District Court lacked discretion to deny relief on the corporation's claim. Nonetheless, the issues in the suit were "intimately involved with [the State's] sovereign prerogative." *Ibid.* We concluded that "[t]he considerations that prevailed in conventional equity suits for avoiding the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities are similarly appropriate in a state eminent domain proceeding brought in, or removed to, a federal court." *Ibid.* And based on that conclusion, we affirmed the District Court's order staying the case.

County of Allegheny was decided the same day as *Thibodaux,* and like *Thibodaux* it involved review of a District Court order abstaining from the exercise of diversity jurisdiction over a state law eminent domain action. Unlike in *Thibodaux,* however, the District Court in *County of Allegheny* had not merely stayed adjudication of the federal action pending the resolution of an issue in state court, but rather had dismissed the federal action altogether. Based in large measure on this distinction, we reversed the District Court's order. See 360 U. S., at 190; *Thibodaux,* 360 U. S., at 31 (Stewart, J., concurring) ("In *Mashuda,* the Court holds that it was error for the District Court to *dismiss* the complaint" (emphasis added)).

We were careful to note in *Thibodaux* that the District Court had only *stayed* the federal suit pending adjudication of the dispute in state court. Unlike the outright dismissal or remand of a federal suit, we held, an order merely staying the action "does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition." *Id.,* at 29. We have thus held that in cases where the relief being sought is equitable in nature or otherwise discretionary, federal courts not only have the power to stay the action based on abstention principles, but can also, in otherwise appropriate circumstances, decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court. By contrast, while we have held that federal courts may stay actions for damages based on abstention principles, we have not held that those principles support the outright dismissal or remand of damages actions.

One final line of cases bears mentioning. Though we deal here with our abstention doctrines, we have recognized that federal courts have discretion to dismiss damages actions, in certain narrow circumstances, under the common-law doctrine of *forum non conveniens.* The seminal case recognizing this authority is *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501

(1947), in which we considered whether a Federal District Court sitting in diversity in New York could dismiss a tort action for damages on the grounds that Virginia provided a more appropriate locale for adjudicating the dispute. *Id.*, at 503. We conceded that the application of this doctrine should be "rare," *id.*, at 509, but also held that the exercise of *forum non conveniens* is not limited to actions in equity:

> "This Court[,] in recognizing and approving it by name has never indicated that it was rejecting application of the doctrine to law actions which had been an integral and necessary part of [the] evolution of the doctrine. Wherever it is applied in courts in other jurisdictions, its application does not depend on whether the action is at law or in equity." *Id.*, at 505, n. 4 (citations omitted).

The dispute in *Gulf Oil* was over venue, not jurisdiction, and the expectation was that after dismissal of the suit in New York the parties would refile in federal court, not the state courts of Virginia. This transfer of venue function of the *forum non conveniens* doctrine has been superseded by statute, see 28 U. S. C. § 1404(a); *Piper Aircraft Co.* v. *Reyno*, 454 U. S. 235, 253 (1981), and to the extent we have continued to recognize that federal courts have the power to dismiss damages actions under the common-law *forum non conveniens* doctrine, we have done so only in "cases where the alternative forum is abroad." *American Dredging Co.* v. *Miller*, 510 U. S. 443, 449, n. 2 (1994); see, *e. g.*, *Piper*, *supra*, at 265–269 (dismissal of wrongful death action).

The fact that we have applied the *forum non conveniens* doctrine in this manner does not change our analysis in this case, where we deal with the scope of the *Burford* abstention doctrine. To be sure, the abstention doctrines and the doctrine of *forum non conveniens* proceed from a similar premise: In rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum. But our abstention doctrine is of a distinct historical pedigree, and the traditional considerations behind dismissal for *forum non conveniens* differ markedly from those informing the decision to abstain. Compare *American Dredging, supra,* at 448–449 (describing "multifarious factors," including both public and private interests, which might allow a district court to dismiss a case under doctrine of *forum non conveniens*), with *Burford,* 319 U. S., at 332–333 (describing "federal-state conflict" that requires a federal court to yield jurisdiction in favor of a state forum). Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism. See, *e. g., ibid.; Younger,* 401 U. S., at 44–45. Dismissal for *forum non conveniens,* by contrast, has historically reflected a far broader range of considerations, see *Piper, supra,* at 241, 257–262 (describing the interests which bear on *forum non conveniens* decision); *Gulf Oil, supra,* at 508–509 (same), most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality, see *Piper, supra,* at 257–259 (evidentiary problems, unavailability of witnesses, difficulty of coordinating multiple suits); *Gulf Oil, supra,* at 511 (availability of witnesses, need to interplead Virginia corporation, location of evidence).

B

With these background principles in mind, we consider the contours of the *Burford* doctrine. The principal issue presented in *Burford* was the "reasonableness" of an order issued by the Texas Railroad Commission, which granted "a permit to drill four oil wells on a small plot of land in the East Texas oil field." 319 U. S., at 317. Due to the potentially overlapping claims of the many parties who might have an interest in a common pool of oil and the need for uniform regulation of the oil industry, Texas endowed the Railroad Commission with exclusive regulatory authority in the area. Texas also placed the authority to review the Commission's orders in a single set of state courts, "[t]o prevent the confusion of multiple review," *id.*, at 326, and to permit an experienced cadre of state judges to obtain "specialized knowledge" in the field, *id.*, at 327. Though Texas had thus demonstrated its interest in maintaining uniform review of the Commission's orders, the federal courts had, in the years preceding *Burford*, become increasingly involved in reviewing the reasonableness of the Commission's orders, both under a constitutional standard imposed under the Due Process Clause, see, *e. g., Railroad Comm'n of Tex.* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 577 (1940), and under state law, which established a similar standard, see *Burford*, 319 U. S., at 317, 326.

Viewing the case as "a simple proceeding in equity to enjoin the enforcement of the Commissioner's order," *id.*, at 317, we framed the question presented in terms of the power of a federal court of equity to abstain from exercising its jurisdiction:

> "Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, 'refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest,' for it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.' While many other questions are argued, we find it necessary to decide only one: Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?" *Id.*, at 317–318 (footnote omitted) (quoting *United States ex rel. Greathouse* v. *Dern*, 289 U. S. 352, 360 (1933), and *Pennsylvania* v. *Williams*, 294 U. S., at 185).

Having thus posed the question in terms of the District Court's discretion, as a court sitting "in equity," to decline jurisdiction, we approved the District Court's dismissal of the complaint on a number of grounds that were unique to that case. We noted, for instance, the difficulty of the regulatory issues presented, stating that the "order under consideration is part of the general regulatory system devised for the conservation of oil and gas in Texas, an aspect of 'as thorny a problem as has challenged the ingenuity and wisdom of legislatures.'" 319 U. S., at 318 (quoting *Rowan, supra,* at 579). We also stressed the demonstrated need for uniform regulation in the area, 319 U. S., at 318–319, citing the unified procedures Texas had established to "prevent the confusion of multiple review," *id.,* at 325–326, and the important state interests this uniform system of review was designed to serve, *id.,* at 319–320. Most importantly, we also described the detrimental impact of ongoing federal court review of the Commission's orders, which review had already led to contradictory adjudications by the state and federal courts. *Id.,* at 327–328, 331–332.

We ultimately concluded in *Burford* that dismissal was appropriate because the availability of an alternative, federal forum threatened to frustrate the purpose of the complex administrative system that Texas had established. See *id.,* at 332 ("The whole cycle of federal-state conflict cannot be permitted to begin again"). We have since provided more generalized descriptions of the *Burford* doctrine, see, *e. g., County of Allegheny,* 360 U. S., at 189 ("abstention on grounds of comity with the States where the exercise of jurisdiction by the federal court would disrupt a state administrative process"); *Colorado River,* 424 U. S., at 814–816 (abstention where "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern"), but with the exception of cases that rest only loosely on the *Burford* rationale, *e. g.,* *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25 (1959), we have revisited the decision only infrequently in the intervening 50 years. See *NOPSI,* 491 U. S. 350 (1989).

In *NOPSI,* our most recent exposition of the *Burford* doctrine, we again located the power to dismiss based on abstention principles in the discretionary power of a federal court sitting in equity, and we again illustrated the narrow range of circumstances in which *Burford* can justify the dismissal of a federal action. The issue in *NOPSI* was pre-emption. A New Orleans utility that had been saddled by a decision of the Federal Energy Regulatory Commission (FERC) with part of the cost of building and operating a nuclear reactor sought approval of a rate increase from the Council of the City of New Orleans. The council denied the rate increase on the grounds that "a public hearing was necessary to explore 'the legality and prudency' *[sic]*" of the expenses allocated to the utility under the FERC decision, 491 U. S., at 355, and the utility brought suit in federal court, seeking an injunction against enforcement of the council's order and a declaration that the utility was entitled to a rate increase. The utility claimed that "federal law required the Council to allow it to recover, through an increase in retail rates, its FERC-allocated share of the [cost of the reactor]." *Ibid.* The federal pre-emption question was the only issue raised in the case; there were no state law claims.

In reversing the District Court's decision to dismiss under *Burford,* we recognized "the federal courts' discretion in determining whether to grant certain types of relief," 491 U. S., at 359, and we indicated, as we had previously in *Alabama Pub. Serv. Comm'n* v. *Southern R. Co.,* 341 U. S. 341, 350–351 (1951), that *Burford* permits "a federal court sitting in equity," 491 U. S., at 361, to dismiss a case only in extraordinary circumstances. We thus indicated that *Burford* allows a federal court to dismiss a case only if it presents "'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,'" or if its adjudication in a federal forum "'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" 491 U. S., at 361 (quoting *Colorado River, supra,* at 814).

We ultimately held that *Burford* did not provide proper grounds for an abstention-based dismissal in *NOPSI* because the "case [did] not involve a state-law claim, nor even an assertion that the federal claims [were] 'in any way entangled in a skein of state law that must be untangled before the federal case can proceed,'" 491 U. S., at 361 (quoting *McNeese* v. *Board of Ed. for Community Unit School Dist. 187,* 373 U. S. 668, 674 (1963)), and because there was no serious threat of conflict between the adjudication of the federal claim presented in the case and the State's interest in ensuring uniformity in ratemaking decisions:

> "While *Burford* is concerned with protecting complex state administrative processes from undue federal influence, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy. Here, NOPSI's primary claim is that the Council is prohibited by federal law from refusing to provide reimbursement for FERC-allocated wholesale costs. Unlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an 'essentially local problem.'" 491 U. S., at 362 (quoting *Alabama Pub. Serv. Comm'n, supra,* at 347) (citations omitted).

These cases do not provide a formulaic test for determining when dismissal under *Burford* is appropriate, but they do demonstrate that the power to dismiss under the *Burford* doctrine, as with other abstention doctrines, see *supra*, at 716–723 (describing the traditional application of the abstention doctrines), derives from the discretion historically enjoyed by courts of equity. They further demonstrate that exercise of this discretion must reflect "principles of federalism and comity." *Growe* v. *Emison*, 507 U. S. 25, 32 (1993). Ultimately, what is at stake is a federal court's decision, based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the "independence of state action," *Burford*, 319 U. S., at 334, that the State's interests are paramount and that a dispute would best be adjudicated in a state forum. See *NOPSI, supra*, at 363 (question under *Burford* is whether adjudication in federal court would "unduly intrude into the processes of state government or undermine the State's ability to maintain desired uniformity"). This equitable decision balances the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court, against the State's interests in maintaining "uniformity in the treatment of an 'essentially local problem,'" 491 U. S., at 362 (quoting *Alabama Pub. Serv. Comm'n, supra*, at 347), and retaining local control over "difficult questions of state law bearing on policy problems of substantial public import," *Colorado River*, 424 U. S., at 814. This balance only rarely favors abstention, and the power to dismiss recognized in *Burford* represents an "'extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it.'" *Colorado River, supra*, at 813 (quoting *County of Allegheny*, 360 U. S., at 188).

C

We turn, finally, to the application of *Burford* in this case. As in *NOPSI*, see 491 U. S., at 363, the federal interests in this case are pronounced, as Allstate's motion to compel arbitration under the Federal Arbitration Act (FAA) implicates a substantial federal concern for the enforcement of arbitration agreements. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 631 (1985) (FAA reflects "emphatic federal policy in favor of arbitral dispute resolution"); cf. *Moses H. Cone,* 460 U. S., at 25–26 (in deciding whether to defer to state court adjudication under the *Colorado River* doctrine, "the presence of federal-law issues must always be a major consideration weighing against surrender"). With regard to the state interests, however, the case appears at first blush to present nothing more than a run-of-the-mill contract dispute. The Commissioner seeks damages from Allstate for Allstate's failure to perform its obligations under a reinsurance agreement. What differentiates this case from other diversity actions seeking damages for breach of contract, if anything, is the impact federal adjudication of the dispute might have on the ongoing liquidation proceedings in state court: The Commissioner claims that any recovery by Allstate on its setoff claims would amount to an illegal "preference" under state law. This question appears now to have been conclusively answered by the California Supreme Court, see *Prudential Reinsurance Co.* v. *Superior Court of Los Angeles Cty.*, 3 Cal. 4th 1118, 842 P. 2d 48 (1992) (permitting reinsurers to assert setoff claims in suits filed by the Commissioner in the Mission insolvency), although at the time the District Court ruled this question was still hotly contested.

The Ninth Circuit concluded that the District Court's remand order was inappropriate because "*Burford* abstention does not apply to suits seeking solely legal relief." 47 F. 3d, at 354. Addressing our abstention cases, the Ninth Circuit held that the federal courts' power to abstain in certain cases is "locat[ed] . . . in the unique powers of equitable courts," and that it derives from equity courts' " 'discretionary power to grant or withhold relief.' " 47 F. 3d, at 355 (quoting *Alabama Pub. Serv. Comm'n* v. *Southern R. Co.*, 341 U. S., at 350–351). The Ninth Circuit's reversal of the District Court's abstention–based remand order in this case therefore reflects the application of a *per se* rule: "[T]he power of federal courts to abstain from exercising their jurisdiction, at least in *Burford* abstention cases, is founded upon a discretion they possess only in equitable cases." 47 F. 3d, at 355–356.

To the extent the Ninth Circuit held only that a federal court cannot, under *Burford*, dismiss or remand an action when the relief sought is not discretionary, its judgment is consistent with our abstention cases. We have explained the power to dismiss or remand a case under the abstention doctrines in terms of the discretion federal courts have traditionally exercised in deciding whether to provide equitable or discretionary relief, see *supra*, at 717–719, 721–722, and the Commissioner appears to have conceded that the relief being sought in this case is neither equitable nor otherwise committed to the discretion of the court. See App. to Pet. for Cert. 35a–37a (order denying petition for rehearing). In those cases in which we have applied traditional abstention principles to damages actions, we have only permitted a federal court to "withhold action until the state proceedings have concluded," *Growe*, 507 U. S., at 32; that is, we have permitted federal courts applying abstention principles in damages actions to enter a stay, but we have not permitted them to dismiss the action altogether, see *supra*, at 719–721.

The *per se* rule described by the Ninth Circuit is, however, more rigid than our precedents require. We have not strictly limited abstention to "equitable cases," 47 F. 3d, at 356, but rather have extended the doctrine to all cases in which a federal court is asked to provide some form of discretionary relief. See *Huffman*, 319 U. S., at 297; *Samuels*, 401 U. S., at 69–70, 72–73; *supra*, at 718–719. Moreover, as demonstrated by our decision in *Thibodaux*, see *supra*, at 719–721, we have not held that abstention principles are completely inapplicable in damages actions. *Burford* might support a federal court's decision to postpone adjudication of a damages action pending the resolution by the state courts of a disputed question of state law. For example, given the situation the District Court faced in this case, a stay order might have been appropriate: The setoff issue was being decided by the state courts at the time the District Court ruled, see *Prudential Reinsurance Co., supra,* and in the interest of avoiding inconsistent adjudications on that point, the District Court might have been justified in entering a stay to await the outcome of the state court litigation.

Like the Ninth Circuit, we review only the remand order which was entered, and find it unnecessary to determine whether a more limited abstention-based stay order would have been warranted on the facts of this case. We have no occasion to resolve what additional authority to abstain might be provided under our decision in *Fair Assessment,* see *supra,* at 719. Nor do we find it necessary to inquire fully as to whether this case presents the sort of "exceptional circumstance" in which *Burford* abstention or other grounds for yielding federal jurisdiction might be appropriate. Under our precedents, federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary. Because this was a damages action, we conclude that the District Court's remand order was an unwarranted application of the *Burford* doctrine. The judgment is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the opinion of the Court. I write separately only to respond to JUSTICE KENNEDY's concurrence.

JUSTICE KENNEDY, while joining the opinion of the Court, says that he would "not rule out . . . the possibility that a federal court might dismiss a suit for damages in a case where a serious affront to the interests of federalism could be averted in no other way," *post,* at 733. I would not have joined today's opinion if I believed it left such discretionary dismissal available. Such action is foreclosed, I think, by the Court's holding, clearly summarized in the concluding sentences of the opinion: "Under our precedents, federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary. Because this was a damages action, we conclude that the District Court's remand order was an unwarranted application of the *Burford* doctrine." *Ante,* at 731.

JUSTICE KENNEDY's projected horrible of a "serious affront to the interests of federalism" cannot possibly materialize under the Court's holding. There *is* no "serious affront to the interests of federalism" when Congress lawfully decides to pre-empt state action—which is what our cases hold (and today's opinion affirms) Congress does whenever it instructs federal courts to assert jurisdiction over matters as to which relief is not discretionary.

If the Court today felt empowered to decide for itself when congressionally decreed jurisdiction constitutes a "serious affront" and when it does not, the opinion would have read much differently. Most pertinently, it would not have found it *unnecessary* "to inquire fully as to whether this case presents the sort of 'exceptional circumstance' in which *Burford* abstention or other grounds for yielding federal jurisdiction might be appropriate." *Ibid.* There were certainly grounds for such an inquiry if we thought it relevant. The "[then] unsettled but since resolved question of California law" to which JUSTICE KENNEDY refers, *post,* at 733, was only part of the basis for the District Court's decision to remand to state court; the court also pointed more generally to what it thought was the State's "overriding interest in regulating insurance insolvencies and liquidations in a uniform and orderly manner," App. to Pet. for Cert. 34a. As the Court's opinion says, it is not necessary to inquire fully into that matter because this was a damages action.

JUSTICE KENNEDY, concurring.

When this suit first was filed, it raised an unsettled but since resolved question of California law concerning the ability of companies in Allstate's position to set off claims held against Mission. The principal reason for the District Court's decision to dismiss the case was the threat posed to the state proceedings by different state and federal rulings on the question. The court's concern was reasonable. States, as a matter of tradition and express federal consent, have an important interest in maintaining precise and detailed regulatory schemes for the insurance industry. See, *e. g.*, the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. § 1011 *et seq.* The fact that a state court rather than an agency was chosen to implement California's scheme provided more reason, not less, for the federal court to stay its hand.

At the same time, however, we have not considered a case in which dismissal of a suit for damages by extension of the doctrine of *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943), was held to be authorized and necessary. As the Court explains, no doubt the preferred course in such circumstances is to resolve any serious potential for federal intrusion by staying the suit while retaining jurisdiction. We ought not rule out, though, the possibility that a federal court might dismiss a suit for damages in a case where a serious affront to the interests of federalism could be averted in no other way. We need not reach that question here.

Abstention doctrines are a significant contribution to the theory of federalism and to the preservation of the federal system in practice. They allow federal courts to give appropriate and necessary recognition to the role and authority of the States. The duty to take these considerations into account must inform the exercise of federal jurisdiction. Principles of equity thus are not the sole foundation for abstention rules; obligations of comity, and respect for the appropriate balance between state and federal interests, are an important part of the justification and authority for abstention as well. See, *e. g., id.*, at 334 ("[A] sound respect for the independence of state action requires the federal equity court to stay its hand"); *Younger* v. *Harris*, 401 U. S. 37, 44 (1971) (rooting abstention in "a proper respect for state functions" and "sensitivity to the legitimate interests of both State and National Governments"); *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817 (1976) (abstention doctrines are based on "considerations of proper constitutional adjudication and regard for federal-state relations"). See also Shapiro, Jurisdiction and Discretion, 60 N. Y. U. L. Rev. 543, 551–552 (1985). The traditional role of discretion in the exercise of equity jurisdiction makes abstention easiest to justify in cases where equitable relief is sought, but abstention, including dismissal, is a possibility that may yet be addressed in a suit for damages, if fundamental concerns of federalism require us to face the issue.

With these observations, I join the opinion of the Court.

SMILEY *v.* CITIBANK (SOUTH DAKOTA), N. A.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 95–860. Argued April 24, 1996—Decided June 3, 1996

Petitioner, a resident of California, held credit cards issued by respondent, a national bank located in South Dakota. She filed suit in state court, alleging that late-payment fees charged by respondent, although legal under South Dakota law, violated California law. Respondent moved for judgment on the pleadings, contending that petitioner's state-law claims were pre-empted by a provision of the National Bank Act of 1864 that permits a national bank to charge its loan customers "interest at the rate allowed by the laws of the State . . . where the bank is located," 12 U. S. C. § 85, see *Marquette Nat. Bank of Minneapolis* v. *First of Omaha Service Corp.*, 439 U. S. 299. The California Superior Court, accepting respondent's argument that credit card late-payment fees constitute "interest" for purposes of § 85, granted respondent's motion. The State Court of Appeal and State Supreme Court affirmed.

Held: The Comptroller of the Currency has reasonably interpreted the term "interest" in § 85 to include late-payment fees, see 12 CFR § 7.4001(a), and petitioner has failed to establish that the Court should not accord its customary deference to the Comptroller's interpretation of an ambiguous provision of the National Bank Act. Pp. 739–747.

(a) Where a provision of the National Bank Act is ambiguous, the Court, pursuant to *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845, defers to reasonable judgments of the Comptroller, the official charged with administering the Act. *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 256–257. Petitioner's argument that deference is not owing to the recently adopted 12 CFR § 7.4001(a) is unpersuasive. The validity of the Comptroller's interpretation is not affected by the fact that the regulation was issued more than 100 years after § 85 was enacted or that it was litigation, including this very suit, which disclosed the need for the regulation. And the distinction that the regulation makes between those charges designated as interest and those not so classified is not arbitrary or capricious. See *Chevron, supra,* at 844. Petitioner errs in contending that an agency interpretation that contradicts a prior agency position is necessarily invalid; in any event, she fails to show that a change of official agency position has occurred here. Finally, the issue here, the meaning of § 85, does not bring into play the pre-emption considerations that petitioner raises. Pp. 739–744.

(b) The Comptroller's interpretation of the statutory term "interest" is reasonable. There is no indication that, at the time of the passage of the National Bank Act, common usage of the word "interest" or the phrase "at the rate allowed" required that interest charges be expressed as functions of time and amount owing. Nor is there support for petitioner's contention that the late fees are "penalties" rather than "interest." See *Citizens' Nat. Bank of Kansas City* v. *Donnell*, 195 U. S. 369. Pp. 744–747.

11 Cal. 4th 138, 900 P. 2d 690, affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

Michael D. Donovan argued the cause for petitioner. With him on the briefs were *Pamela P. Bond, Patrick J. Grannan, Robin B. Howald,* and *Michael P. Malakoff.*

Richard B. Kendall argued the cause for respondent. With him on the brief were *Michael H. Strub, Jr., Louis R. Cohen, Ronald J. Greene,* and *Christopher R. Lipsett.*

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days, Assistant Attorney General Hunger, Deputy Solicitor General Bender, Barbara C. Biddle, Jacob M. Lewis, Julie L. Williams, L. Robert Griffin,* and *Joan M. Bernott.**

---

*Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Massachusetts et al. by *Scott Harshbarger,* Attorney General of Massachusetts, *Ernest L. Sarason, Jr.,* Assistant Attorney General, *Charles F. C. Ruff,* Corporation Counsel of the District of Columbia, and by the Attorneys General for their respective States as follows: *Winston Bryant* of Arkansas, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Thomas J. Miller* of Iowa, *A. B. Chandler* of Kentucky, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.,* of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Jeffrey R. Howard* of New Hampshire, *Deborah T. Poritz* of New Jersey, *Tom Udall* of New Mexico, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Jeffrey B. Pine* of Rhode Island, *Charles W. Burson* of Tennessee, *Dan Morales* of Texas, *Jeffrey L. Amestoy* of Vermont, *Christine Gregoire* of Washington, and *Darrell V. McGraw, Jr.,* of West Virginia; for the Bankcard Holders of America by *Kennedy P. Richardson;* for Consumer Action by *James C.*

JUSTICE SCALIA delivered the opinion of the Court.

Section 30 of the National Bank Act of 1864, Rev. Stat. § 5197, as amended, 12 U. S. C. § 85, provides that a national bank may charge its loan customers "interest at the rate allowed by the laws of the State . . . where the bank is located." In *Marquette Nat. Bank of Minneapolis* v. *First of Omaha Service Corp.*, 439 U. S. 299 (1978), we held that this provision authorizes a national bank to charge out-of-state credit-card customers an interest rate allowed by the bank's home State, even when that rate is higher than what is permitted by the States in which the cardholders reside. The question in this case is whether § 85 also authorizes a national bank to charge late-payment fees that are lawful in the bank's home State but prohibited in the States where the cardholders reside—in other words, whether the statutory term "interest" encompasses late-payment fees.

I

Petitioner, a resident of California, held two credit cards—a "Classic Card" and a "Preferred Card"—issued by respond-

---

Sturdevant; and for the National Consumer Law Center et al. by *Mark A. Chavez* and *Patricia Sturdevant.*

Briefs of *amici curiae* urging affirmance were filed for the State of Colorado et al. by *Betty D. Montgomery,* Attorney General of Ohio, *Jeffrey S. Sutton,* State Solicitor, *Carter G. Phillips,* and *James M. Harris,* and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Gale A. Norton* of Colorado, *M. Jane Brady* of Delaware, *Michael J. Bowers* of Georgia, *Jim Ryan* of Illinois, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Mark Barnett* of South Dakota, *Jan Graham* of Utah, and *James S. Gilmore III* of Virginia; for Affinity Group Marketing et al. by *Theodore W. Kheel;* for the American Bankers Association et al. by *Shirley M. Hufstedler, L. Richard Fischer, James A. Huizinga,* and *W. Stephen Smith;* for Greenwood Trust Co. et al. by *Arthur R. Miller, Alan S. Kaplinsky,* and *Burt M. Rublin;* for the New York Clearing House Association by *John L. Warden* and *Richard J. Urowsky;* and for Trial Lawyers for Public Justice et al. by *Ann Miller* and *Adele P. Kimmel.*

ent, a national bank located in Sioux Falls, South Dakota. The Classic Card agreement provided that respondent would charge petitioner a late fee of $15 for each monthly period in which she failed to make her minimum monthly payment within 25 days of the due date. Under the Preferred Card agreement, respondent would impose a late fee of $6 if the minimum monthly payment was not received within 15 days of its due date; and an additional charge of $15 or 0.65% of the outstanding balance on the Preferred Card, whichever was greater, if the minimum payment was not received by the *next* minimum monthly payment due date. Petitioner was charged late fees on both cards.

These late fees are permitted by South Dakota law, see S. D. Codified Laws §§ 54–3–1, 54–3–1.1 (1990 and Supp. 1995). Petitioner, however, is of the view that exacting such "unconscionable" late charges from California residents violates California law, and in 1992 brought a class action against respondent on behalf of herself and other California holders of respondent's credit cards, asserting various statutory and common-law claims.[1] Respondent moved for judgment on the pleadings, contending that petitioner's claims were pre-empted by § 85. The Superior Court of Los Angeles County initially denied respondent's motion, but the California Court of Appeal, Second Appellate District, issued a writ of mandate directing the Superior Court to either grant the motion or show cause why it should not be required to do so. The Superior Court chose the former course, and the Court of Appeal affirmed its dismissal of the complaint, 26 Cal. App. 4th 1767, 32 Cal. Rptr. 2d 562 (1994). The Supreme Court of California granted review and affirmed, two justices dissenting. 11 Cal. 4th 138, 900 P. 2d 690 (1995). We granted certiorari. 516 U. S. 1087 (1996).

---

[1] By way of common-law claims, petitioner's complaint alleged breach of duty of good faith and fair dealing; unjust enrichment; fraud and deceit; negligent misrepresentation; and breach of contract. It also alleged violation of Cal. Bus. & Prof. Code Ann. § 17200 (West Supp. 1996) (prohibiting unlawful business practices) and Cal. Civ. Code Ann. § 1671 (West 1985) (invalidating unreasonable liquidated damages).

II

In light of the two dissents from the opinion of the Supreme Court of California, see 11 Cal. 4th, at 165, 177, 900 P. 2d, at 708, 716 (Arabian, J., dissenting, and George, J., dissenting), and in light of the opinion of the Supreme Court of New Jersey creating the conflict that has prompted us to take this case,[2] it would be difficult indeed to contend that the word "interest" in the National Bank Act is unambiguous with regard to the point at issue here. It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984). As we observed only last Term, that practice extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws. "The Comptroller of the Currency," we said, "is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws." *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 256–257 (1995) (citations and internal quotation marks omitted).

On March 3, 1995, which was after the California Superior Court's dismissal of petitioner's complaint, the Comptroller of the Currency noticed for public comment a proposed regulation dealing with the subject before us, see 60 Fed. Reg. 11924, 11940, and on February 9, 1996, which was after the California Supreme Court's decision, he adopted the following provision:

---

[2] *Sherman* v. *Citibank (South Dakota), N. A.*, 143 N. J. 35, 668 A. 2d 1036 (1995). The Supreme Court of Colorado and the United States Court of Appeals for the First Circuit have adopted the same interpretation as the Supreme Court of California. See *Copeland* v. *MBNA America Bank, N. A.*, 907 P. 2d 87 (Colo. 1995); *Greenwood Trust Co.* v. *Massachusetts*, 971 F. 2d 818, 829–831 (CA1 1992) (dictum), cert. denied, 506 U. S. 1052 (1993).

> "The term 'interest' as used in 12 U. S. C. § 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports." 61 Fed. Reg. 4869 (to be codified in 12 CFR § 7.4001(a)).

Petitioner proposes several reasons why the ordinary rule of deference should not apply to this regulation. First, petitioner points to the fact that this regulation was issued more than 100 years after the enactment of § 85, and seemingly as a result of this and similar litigation in which the Comptroller has participated as *amicus curiae* on the side of the banks. The 100-year delay makes no difference. To be sure, agency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist. But neither antiquity nor contemporaneity with the statute is a condition of validity. We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows. See *Chevron, supra,* at 843–844. Nor does it matter that the regulation was prompted by litigation, including this very suit. Of course we deny deference "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice," *Bowen* v. *Georgetown Univ. Hospital,* 488 U. S. 204, 212 (1988). The deliberateness of such positions, if not indeed their authoritativeness, is suspect. But we have before us here a full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation, see 5 U. S. C. § 553; *Thompson* v. *Clark,* 741 F. 2d 401, 409 (CADC 1984). That it was litigation which disclosed the need for the regulation is irrelevant.

Second, petitioner contends that the Comptroller's regulation is not deserving of our deference because "there is no rational basis for distinguishing the various charges [it] has denominated interest . . . from those charges it has denominated 'non-interest.'" Reply Brief for Petitioner 14. We disagree. As an analytical matter, it seems to us perfectly possible to draw a line, as the regulation does, between (1) "payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended," and (2) all other payments. To be sure, in the broadest sense *all* payments connected in any way with the loan—including reimbursement of the lender's costs in processing the application, insuring the loan, and appraising the collateral—can be regarded as "compensating [the] creditor for [the] extension of credit." But it seems to us quite possible and rational to distinguish, as the regulation does, between those charges that are *specifically as-*

signed to such expenses and those that are assessed for simply making the loan, or for the borrower's default. In its logic, at least, the line is not "arbitrary [or] capricious," and thereby disentitled to deference under *Chevron*, see 467 U. S., at 844. Whether it is "arbitrary [or] capricious" as an interpretation of what the *statute* means—or perhaps even (what *Chevron* also excludes from deference) "manifestly contrary to the statute"—we will discuss in the next Part of this opinion.

Finally, petitioner argues that the regulation is not entitled to deference because it is inconsistent with positions taken by the Comptroller in the past. Of course the mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, see, *e. g., Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 46–57 (1983), or change that does not take account of legitimate reliance on prior interpretation, see, *e. g., United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U. S. 655, 670–675 (1973); *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 295 (1974), may be "arbitrary, capricious [or] an abuse of discretion," 5 U. S. C. § 706(2)(A). But if these pitfalls are avoided, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.

In any case, we do not think that anything which can accurately be described as a change of official agency position has occurred here. The agency's Notice of Proposed Rulemaking asserted that the new regulation "reflect[s] current law and [Office of the Comptroller of the Currency (OCC)] interpretive letters," 60 Fed. Reg. 11929 (1995), and the Statement of Basis and Purpose accompanying the final adoption stated that "[t]he final ruling is consistent with OCC interpretive letters in this area . . . and reflects the position the OCC has taken in *amicus curiae* briefs in litigation pending in many state and Federal courts," 61 Fed. Reg.

4859 (1996) (citing OCC interpretive letters). Petitioner points only to (1) a June 1964 letter from the Comptroller to the President's Committee on Consumer Interests, which states that "[c]harges for late payments, credit life insurance, recording fees, documentary stamp are illustrations of charges which are made by some banks which would not properly be characterized as interest," see App. to Brief for Petitioner 5a; and (2) a 1988 opinion letter from the Deputy Chief Counsel of the OCC stating "it is my position that [under § 85] the laws of the states where the banks are located . . . determine whether or not the banks can impose the foregoing fees and charges [including late fees] on Iowa residents," OCC Interpretive Letter No. 452, reprinted in 1988–1989 Transfer Binder, CCH Fed. Banking L. Rep. ¶ 85,676, p. 78,064 (1988). We doubt whether either of these statements was sufficient in and of itself to establish a binding agency policy—the former, because it was too informal, and the latter because it only purported to represent the position of the Deputy Chief Counsel in response to an inquiry concerning particular banks. Nor can it even be argued that the two statements *reflect* a prior agency policy, since, in addition to contradicting the regulation before us here, they also contradict one another—the former asserting that "interest" is a nationally uniform concept, and the latter that it is to be determined by reference to state law. What these statements show, if anything, is that there was good reason for the Comptroller to promulgate the new regulation, in order to eliminate uncertainty and confusion.

In addition to offering these reasons why 12 CFR § 7.4001(a) in particular is not entitled to deference, petitioner contends that *no* Comptroller interpretation of § 85 is entitled to deference, because § 85 is a provision that preempts state law. She argues that the "presumption against . . . pre-emption" announced in *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 518 (1992), in effect trumps *Chevron*, and requires a court to make its own interpretation of § 85 that will avoid (to the extent possible) pre-emption of state law. This argument confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts. That is *not* the question at issue here; there is no doubt that § 85 pre-empts state law. In *Marquette Nat. Bank of Minneapolis* v. *First of Omaha Service Corp.*, 439 U. S. 299 (1978), we dismissed petitioners' argument that the "exportation" of interest rates from the bank's home State would "significantly impair the ability of States to enact effective usury laws" with the observation that "[t]his impairment . . . has always been implicit in the structure of the National Bank Act . . . . [T]he protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court." *Id.*, at 318–319. What *is* at issue here is simply the meaning of a provision that does not (like the provision in *Cipollone*) deal with pre-emption, and hence does not bring into play the considerations petitioner raises.[3]

III

Since we have concluded that the Comptroller's regulation deserves deference, the question before us is not whether it represents the best interpretation of the statute, but whether it represents a reasonable one. The answer is obviously yes.

---

[3] In a four-line footnote on the last page of her reply brief, and unpursued in oral argument, petitioner raised the point that deferring to the regulation in this case involving antecedent transactions would make the regulation retroactive, in violation of *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 208–209 (1988). Reply Brief for Petitioner 20, n. 17. There might be substance to this point if the regulation replaced a prior agency interpretation—which, as we have discussed, it did not. Where, however, a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means.

Petitioner argues that the late fees charged by respondent do not constitute "interest" because they "do not vary based on the payment owed or the time period of delay." Brief for Petitioner 32–33. We do not think that such a limitation must be read into the statutory term. Most legal dictionaries of the era of the National Bank Act did not place such a limitation upon "interest." See, *e. g.,* 1 J. Bouvier, A Law Dictionary 652 (6th ed. 1856) ("The compensation which is paid by the borrower to the lender or by the debtor to the creditor for . . . use [of money]"); 2 A. Burrill, A Law Dictionary and Glossary 90 (2d ed. 1860); 11 American and English Encyclopedia of Law 379 (J. Merrill ed. 1890). But see J. Wharton, Law Lexicon or Dictionary of Jurisprudence 391 (2d Am. ed. 1860). The definition of "interest" that we ourselves set out in *Brown* v. *Hiatts,* 15 Wall. 177, 185 (1873), decided shortly after the enactment of the National Bank Act, likewise contained no indication that it was limited to charges expressed as a function of time or of amount owing: "Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money or as damages for its detention." See also *Hollowell* v. *Southern Building & Loan Assn.,* 120 N. C. 286, 26 S. E. 781 (1897) ("[A]ny charges made against [the borrower] in excess of the lawful rate of interest, whether called 'fines,' 'charges,' 'dues,' or 'interest,' are in fact interest, and usurious").

Petitioner suggests another source for the asserted requirement that the charges be time- and rate-based: What is authorized by § 85, she notes, is the charging of interest "at the rate allowed" by the laws of the bank's home State. This requires, in her view, that the interest charges be expressed as functions of time and amount owing. It would be surprising to find such a requirement in the Act, if only because it would be so pointless. Any flat charge may, of course, readily be converted to a percentage charge—which was indeed the basis for 19th-century decisions holding that flat charges violated state usury laws establishing maximum "rates." See, *e. g., Craig* v. *Pleiss,* 26 Pa. 271, 272–273 (1856); *Hollowell, supra,* at 286, 26 S. E., at 781. And there is no apparent reason why home-state-approved percentage charges should be permissible but home-state-approved flat charges unlawful. In any event, common usage at the time of the National Bank Act prevents the conclusion that the Comptroller's refusal to give the word "rate" the narrow meaning petitioner demands is unreasonable. The 1849 edition of Webster's gives as one of the definitions of "rate" the "[p]rice or amount stated or fixed on any thing." N. Webster, American Dictionary of the English Language 910. To illustrate this sense of the word, it provides the following examples: "A king may purchase territory at too dear a *rate.* The *rate* of interest is prescribed by law." *Ibid.* Cf. 2 Bouvier, *supra,* at 421 (defining "rate of exchange" as "the price at which a bill drawn in one country upon another, may be sold in the former").

Finally, petitioner contends that the late fees cannot be "interest" because they are "penalties." To support that dichotomy, she points to our opinion in *Meilink* v. *Unemployment Reserves Comm'n of Cal.,* 314 U. S. 564, 570 (1942). But *Meilink* involved a provision of the Bankruptcy Act that disallowed debts owing to governmental entities "as a penalty," except for "the amount of the pecuniary loss sustained by the act . . . out of which the penalty . . . arose, with . . . such interest as may have accrued thereon according to law." *Id.,* at 566. Obviously, this provision uses "interest" to mean *only* that interest which is exacted as commercial compensation, and *not* that interest which is exacted as a penalty. A word often takes on a more narrow connotation when it is expressly opposed to another word: "car," for example, has a broader meaning by itself than it does in a passage speaking of "cars and taxis." In § 85, the term "interest" is *not* used in contradistinction to "penalty," and there is no reason why it cannot include interest charges imposed for that purpose. More relevant than *Meilink* is our opinion in *Citizens' Nat. Bank of Kansas City* v. *Donnell,* 195 U. S. 369 (1904), which did involve §85 (or, more precisely, its predecessor, Rev. Stat. §5197). There, a bank argued that a 12% charge on overdrafts did not violate a state law setting an 8% ceiling on interest rates because, *inter alia,* the overdraft charge "was a penalty because of a failure to pay a debt when due." *Id.,* at 373–374. We dismissed the argument out of hand: "The suggestions as to the twelve per cent charge on overdrafts do not seem to us to need answer." *Id.,* at 374.

* * *

Petitioner devotes much of her brief to the question whether the meaning of "interest" in §85 can constitutionally be left to be defined by the law of the bank's home State—a question that is not implicated by the Comptroller's regulation. Because the regulation is entitled to deference, and because the Comptroller's interpretation of §85 is not an unreasonable one, the decision of the Supreme Court of California must be affirmed.

It is so ordered.

LOVING *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 94–1966. Argued January 9, 1996—Decided June 3, 1996

A general court-martial found petitioner Loving, an Army private, guilty of both premeditated murder and felony murder under Article 118 of the Uniform Code of Military Justice (UCMJ), 10 U. S. C. §§ 918(1), (4). Finding three aggravating factors—(1) that the premeditated murder was committed during a robbery, Rule for Courts-Martial (RCM) 1004(c)(7)(B); (2) that Loving acted as the triggerman in the felony murder, RCM 1004(c)(8); and (3) that Loving, having been found guilty of the premeditated murder, had committed a second murder, also proved at his single trial, RCM 1004(c)(7)(J)—the court-martial sentenced Loving to death. The commander who convened the court-martial approved the findings and sentence. The United States Army Court of Military Review and the United States Court of Appeals for the Armed Forces affirmed, rejecting Loving's attack on the promulgation by Executive Order of the aggravating factors in RCM 1004. He contends that the Eighth Amendment and the separation-of-powers doctrine require that Congress, not the President, make the fundamental policy determination respecting the factors that warrant the death penalty.

Held:

1. On the assumption that *Furman* v. *Georgia*, 408 U. S. 238, and subsequent cases apply to this crime and sentence, the Constitution requires the aggravating factors that Loving challenges. Under the Eighth Amendment, the military capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the accused compared to others found guilty of murder, see, *e. g.*, *Lowenfield* v. *Phelps*, 484 U. S. 231, 244. That narrowing is not achieved in the statute. Article 118 authorizes the death penalty for but two of the four types of murder therein specified, premeditated and felony murder, §§ 918(1), (4), whereas intentional murder without premeditation and murder resulting from wanton and dangerous conduct are not punishable by death, §§ 918(2), (3). Moreover, Article 118(4) by its terms permits the death penalty for felony murder even if the accused had no intent to kill and did not do the killing himself. Because the Eighth Amendment does not permit death to be imposed in those circumstances, *Enmund* v. *Florida*, 458 U. S. 782, 801, additional aggravating

factors establishing a higher culpability are necessary to Article 118's constitutional validity, see, *e. g., Lowenfield, supra,* at 244. Pp. 755–756.

2. The President's prescription of the challenged aggravating factors did not violate the separation-of-powers principle. Pp. 756–774.

(a) The fundamental precept of the delegation doctrine, a strand of this Court's separation-of-powers jurisprudence, is that the lawmaking function belongs to Congress, U. S. Const., Art. I, § 1, and may not be conveyed to another branch or entity, *Field* v. *Clark,* 143 U. S. 649, 692. This principle does not mean, however, that only Congress can make a rule of prospective force. Although it may not delegate the power to make the law, which necessarily involves discretion as to what the law shall be, Congress may delegate to others the authority or discretion to execute the law under and in pursuance of its terms. *Id.,* at 693–694. Pp. 756–759.

(b) The Court rejects Loving's argument that Congress lacks power to delegate to the President the authority to prescribe aggravating factors in capital murder cases. An analysis of English constitutional history and of the historical necessities and events that instructed the Framers demonstrates that U. S. Const., Art. I, § 8, cl. 14—which empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval forces"—does not grant an exclusive, nondelegable power to determine military punishments, but gives Congress such flexibility to exercise or share power as the times might demand. And it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority. Thus, in the circumstances presented here, Congress may delegate authority to the President to define the aggravating factors that permit imposition of a statutory penalty, with the regulations providing the narrowing of the death-eligible class that the Eighth Amendment requires. Pp. 759–769.

(c) Also rejected is Loving's contention that, even if Congress can delegate to the President the authority to prescribe aggravating factors, Congress did not do so by implicit or explicit action in this instance. In fact, Congress exercised that power of delegation in 1950, when it enacted Articles 18, 56, and 36(a) of the UCMJ, 10 U. S. C. §§ 818 (A court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized"), 856 ("The punishment which a court-martial may direct . . . may not exceed such limits as the President may prescribe for that offense"), and 836(a) (which empowers the President to make procedural rules for courts-martial, and was identified by Congress in 1985 as a source of Presidential authority to provide capital aggravating factors). Together, these Articles give clear authority to the President to promulgate RCM 1004. Pp. 769–771.

(d) Loving's final assertion—that even if Articles 18, 56, and 36 can be construed as delegations, they lack an intelligible principle to guide the President's discretion—is also rejected. Had the delegations here called for the exercise of judgment or discretion that lies beyond the President's traditional authority, this argument might have more weight. However, because the President's duties as Commander in Chief require him to take responsible and continuing action to superintend the military, including the courts-martial, the delegated duty to prescribe aggravating factors for capital cases is interlinked with duties already assigned to him by the Constitution's express terms. The same limitations on delegation do not apply where the entity exercising the delegated authority possesses independent authority over the subject matter. See, *e. g., United States* v. *Mazurie,* 419 U. S. 544, 556–557. Pp. 771–774.

41 M. J. 213, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined, and in which O'CONNOR and SCALIA, JJ., joined as to Parts I, II, III, IV–B, and IV–C. STEVENS, J., filed a concurring opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 774. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which O'CONNOR, J., joined, *post,* p. 775. THOMAS, J., filed an opinion concurring in the judgment, *post,* p. 777.

John H. Blume argued the cause for petitioner. With him on the briefs were *Teresa L. Norris, Roy H. Hewitt, Fran W. Walterhouse,* and *Walter S. Weedman.*

Deputy Solicitor General Kneedler argued the cause for the United States. With him on the brief were *Solicitor General Days, Acting Assistant Attorney General Keeney, Miguel A. Estrada,* and *John F. De Pue.**

**Ronald W. Meister, Steven R. Shapiro,* and *Diann Y. Rust-Tierney* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

Kent S. Scheidegger and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for Public Citizen, Inc., by *Alan B. Morrison, David C. Vladeck,* and *Eugene R. Fidell;* for the United States

JUSTICE KENNEDY delivered the opinion of the Court.

The case before us concerns the authority of the President, in our system of separated powers, to prescribe aggravating factors that permit a court-martial to impose the death penalty upon a member of the Armed Forces convicted of murder.

I

On December 12, 1988, petitioner Dwight Loving, an Army private stationed at Fort Hood, Texas, murdered two taxicab drivers from the nearby town of Killeen. He attempted to murder a third, but the driver disarmed him and escaped. Civilian and Army authorities arrested Loving the next afternoon. He confessed.

After a trial, an eight-member general court-martial found Loving guilty of, among other offenses, premeditated murder and felony murder under Article 118 of the Uniform Code of Military Justice (UCMJ), 10 U. S. C. §§918(1), (4). In the sentencing phase of the trial, the court-martial found three aggravating factors: (1) that the premeditated murder of the second driver was committed during the course of a robbery, Rule for Courts-Martial (RCM) 1004(c)(7)(B); (2) that Loving acted as the triggerman in the felony murder of the first driver, RCM 1004(c)(8); and (3) that Loving, having been found guilty of the premeditated murder, had committed a second murder, also proved at the single trial, RCM 1004(c)(7)(J). The court-martial sentenced Loving to death. The commander who convened the court-martial approved the findings and sentence. Cf. 10 U. S. C. §860. The United States Army Court of Military Review and the United States Court of Appeals for the Armed Forces (formerly the United States Court of Military Appeals (CMA)) affirmed, 41 M. J. 213 (1994), relying on *United States* v. *Curtis*, 32 M. J.

Navy-Marine Corps Appellate Defense Division by *John Francis Havranek, Howard Barry Goodman,* and *Phillip Del Grissom;* and for Marci A. Hamilton et al. by *David Schoenbrod, pro se.*

252 (CMA), cert. denied, 502 U. S. 952 (1991), to reject Loving's claims that the President lacked authority to promulgate the aggravating factors that enabled the court-martial to sentence him to death. We granted certiorari. 515 U. S. 1191 (1995).

II

Although American courts-martial from their inception have had the power to decree capital punishment, they have not long had the authority to try and to sentence members of the Armed Forces for capital murder committed in the United States in peacetime. In the early days of the Republic the powers of courts-martial were fixed in the Articles of War. Congress enacted the first Articles in 1789 by adopting in full the Articles promulgated in 1775 (and revised in 1776) by the Continental Congress. Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96. (Congress reenacted the Articles in 1790 "as far as the same may be applicable to the constitution of the United States," Act of Apr. 30, 1790, ch. 10, § 13, 1 Stat. 121.) The Articles adopted by the First Congress placed significant restrictions on court-martial jurisdiction over capital offenses. Although the death penalty was authorized for 14 military offenses, American Articles of War of 1776, reprinted in W. Winthrop, Military Law and Precedents 961 (reprint 2d ed. 1920) (hereinafter Winthrop); Comment, Rocks and Shoals in a Sea of Otherwise Deep Commitment: General Court-Martial Size and Voting Requirements, 35 Nav. L. Rev. 153, 156–158 (1986), the Articles followed the British example of ensuring the supremacy of civil court jurisdiction over ordinary capital crimes that were punishable by the law of the land and were not special military offenses. 1776 Articles, § 10, Art. 1, reprinted in Winthrop 964 (requiring commanders, upon application, to exert utmost effort to turn offender over to civil authorities). Cf. British Articles of War of 1765, § 11, Art. 1, reprinted in Winthrop 937 (same). That provision was deemed protection enough for soldiers, and in 1806 Congress debated and rejected a proposal to remove the death penalty from court-martial jurisdiction. Wiener, Courts-Martial and the Bill of Rights: The Original Practice I, 72 Harv. L. Rev. 1, 20–21 (1958).

Over the next two centuries, Congress expanded court-martial jurisdiction. In 1863, concerned that civil courts could not function in all places during hostilities, Congress granted courts-martial jurisdiction of common-law capital crimes and the authority to impose the death penalty in wartime. Act of Mar. 3, 1863, § 30, 12 Stat. 736, Rev. Stat. § 1342, Art. 58 (1875); *Coleman* v. *Tennessee*, 97 U. S. 509, 514 (1879). In 1916, Congress granted to the military courts a general jurisdiction over common-law felonies committed by service members, except for murder and rape committed within the continental United States during peacetime. Articles of War of 1916, ch. 418, § 3, Arts. 92–93, 39 Stat. 664. Persons accused of the latter two crimes were to be turned over to the civilian authorities. Art. 74, 39 Stat. 662. In 1950, with the passage of the UCMJ, Congress lifted even this restriction. Article 118 of the UCMJ describes four types of murder subject to court-martial jurisdiction, two of which are punishable by death:

> "Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—
>
> "(1) has a premeditated design to kill;
>
> "(2) intends to kill or inflict great bodily harm;
>
> "(3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or
>
> "(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;
>
> "is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or im-

prisonment for life as a court-martial may direct." 10 U. S. C. § 918.

So matters stood until 1983, when the CMA confronted a challenge to the constitutionality of the military capital punishment scheme in light of *Furman* v. *Georgia,* 408 U. S. 238 (1972), and our ensuing death penalty jurisprudence. Although it held valid most of the death penalty procedures followed in courts-martial, the court found one fundamental defect: the failure of either the UCMJ or the RCM to require that court-martial members "specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty." *United States* v. *Matthews,* 16 M. J. 354, 379. The court reversed Matthews' death sentence, but ruled that either Congress or the President could remedy the defect and that the new procedures could be applied retroactively. *Id.,* at 380–382.

The President responded to *Matthews* in 1984 with an Executive Order promulgating RCM 1004. In conformity with 10 U. S. C. § 852(a)(1), the Rule, as amended, requires a unanimous finding that the accused was guilty of a capital offense before a death sentence may be imposed, RCM 1004(a)(2). The Rule also requires unanimous findings (1) that at least one aggravating factor is present and (2) that any extenuating or mitigating circumstances are substantially outweighed by any admissible aggravating circumstances, 1004(b). RCM 1004(c) enumerates 11 categories of aggravating factors sufficient for imposition of the death penalty. The Rule also provides that the accused is to have "broad latitude to present evidence in extenuation and mitigation," 1004(b)(3), and is entitled to have the members of the court-martial instructed to consider all such evidence before deciding upon a death sentence, 1004(b)(6).

This is the scheme Loving attacks as unconstitutional. He contends that the Eighth Amendment and the doctrine of separation of powers require that Congress, and not the

President, make the fundamental policy determination respecting the factors that warrant the death penalty.

III

A preliminary question in this case is whether the Constitution requires the aggravating factors that Loving challenges. The Government does not contest the application of our death penalty jurisprudence to courts-martial, at least in the context of a conviction under Article 118 for murder committed in peacetime within the United States, and we shall assume that *Furman* and the case law resulting from it are applicable to the crime and sentence in question. Cf. *Trop* v. *Dulles*, 356 U. S. 86 (1958) (analyzing court-martial punishments under the Eighth Amendment). The Eighth Amendment requires, among other things, that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988) (quoting *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983)). Some schemes accomplish that narrowing by requiring that the sentencer find at least one aggravating circumstance. 484 U. S., at 244. The narrowing may also be achieved, however, in the definition of the capital offense, in which circumstance the requirement that the sentencer "find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process." *Id.*, at 246.

Although the Government suggests the contrary, Brief for United States 11, n. 6, we agree with Loving, on the assumption that *Furman* applies to this case, that aggravating factors are necessary to the constitutional validity of the military capital punishment scheme as now enacted. Article 118 authorizes the death penalty for but two of the four types of murder specified: premeditated and felony murder are punishable by death, 10 U. S. C. §§918(1), (4), whereas intentional murder without premeditation and murder resulting from wanton and dangerous conduct are not, §§ 918(2), (3). The statute's selection of the two types of murder for the death penalty, however, does not narrow the death-eligible class in a way consistent with our cases. Article 118(4) by its terms permits death to be imposed for felony murder even if the accused had no intent to kill and even if he did not do the killing himself. The Eighth Amendment does not permit the death penalty to be imposed in those circumstances. *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982). As a result, additional aggravating factors establishing a higher culpability are necessary to save Article 118. We turn to the question whether it violated the principle of separation of powers for the President to prescribe the aggravating factors required by the Eighth Amendment.

IV

Even before the birth of this country, separation of powers was known to be a defense against tyranny. Montesquieu, The Spirit of the Laws 151–152 (T. Nugent transl. 1949); 1 W. Blackstone, Commentaries *146–*147, *269–*270. Though faithful to the precept that freedom is imperiled if the whole of legislative, executive, and judicial power is in the same hands, The Federalist No. 47, pp. 325–326 (J. Madison) (J. Cooke ed. 1961), the Framers understood that a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively," *Buckley* v. *Valeo*, 424 U. S. 1, 120–121 (1976) *(per curiam).*

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring).

Although separation of powers "'d[oes] not mean that these [three] departments ought to have no partial agency in, or no controul over the acts of each other,'" *Mistretta* v. *United States*, 488 U. S. 361, 380–381 (1989) (quoting The Federalist No. 47, *supra*, at 325–326 (emphasis deleted)), it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 225–226 (1995) (Congress may not revise judicial determinations by retroactive legislation reopening judgments); *Bowsher* v. *Synar*, 478 U. S. 714, 726 (1986) (Congress may not remove executive officers except by impeachment); *INS* v. *Chadha*, 462 U. S. 919, 954–955 (1983) (Congress may not enact laws without bicameral passage and presentment of the bill to the President); *United States* v. *Klein*, 13 Wall. 128, 147 (1872) (Congress may not deprive court of jurisdiction based on the outcome of a case or undo a Presidential pardon). Even when a branch does not arrogate power to itself, moreover, the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties. *Mistretta* v. *United States, supra*, at 397–408 (examining whether statute requiring participation of Article III judges in the United States Sentencing Commission threatened the integrity of the Judicial Branch); *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 445 (1977) (examining whether law requiring agency control of Presidential papers disrupted the functioning of the Executive).

Deterrence of arbitrary or tyrannical rule is not the sole reason for dispersing the federal power among three branches, however. By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable. Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking. See *Chadha, supra,* at 951. Ill suited to that task are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control. The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.

Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties. Loving invokes this doctrine to question the authority of the President to promulgate RCM 1004. The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U. S. Const., Art. I, § 1, and may not be conveyed to another branch or entity. *Field* v. *Clark,* 143 U. S. 649, 692 (1892). This principle does not mean, however, that only Congress can make a rule of prospective force. To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government. Thomas Jefferson observed: "Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution." 5 Works of Thomas Jefferson 319 (P. Ford ed. 1904) (letter to E. Carrington, Aug. 4, 1787). See also *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 529–530 (1935) (recognizing "the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly"). This Court established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself. *Wayman* v. *Southard,* 10 Wheat. 1, 42 (1825).

> "'The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring author-

> ity or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'" *Field, supra,* at 693–694, quoting *Cincinnati, W. & Z. R. Co.* v. *Commissioners of Clinton County,* 1 Ohio St. 77, 88–89 (1852).

Loving contends that the military death penalty scheme of Article 118 and RCM 1004 does not observe the limits of the delegation doctrine. He presses his constitutional challenge on three fronts. First, he argues that Congress cannot delegate to the President the authority to prescribe aggravating factors in capital murder cases. Second, he contends that, even if it can, Congress did not delegate the authority by implicit or explicit action. Third, Loving believes that even if certain statutory provisions can be construed as delegations, they lack an intelligible principle to guide the President's discretion. Were Loving's premises to be accepted, the President would lack authority to prescribe aggravating factors in RCM 1004, and the death sentence imposed upon him would be unconstitutional.

A

Loving's first argument is that Congress lacks power to allow the President to prescribe aggravating factors in military capital cases because any delegation would be inconsistent with the Framers' decision to vest in Congress the power "To make Rules for the Government and Regulation of the land and naval Forces." U. S. Const., Art. I, §8, cl. 14. At least in the context of capital punishment for peacetime crimes, which implicates the Eighth Amendment, this power must be deemed exclusive, Loving contends. In his view, not only is the determination of aggravating factors a quintessential policy judgment for the Legislature, but the history of military capital punishment in England and America refutes a contrary interpretation. He asserts that his offense was not tried in a military court throughout most of English and American history. It is this historical exclusion of common-law capital crimes from military jurisdiction, he urges, that must inform our understanding of whether Clause 14 reserves to Congress the power to prescribe what conduct warrants a death sentence, even if it permits Congress to authorize courts-martial to try such crimes. See Brief for Petitioner 42–43; Brief for United States Navy-Marine Corps Appellate Defense Division as *Amicus Curiae* 7–12, 19–26. Mindful of the historical dangers of autocratic military justice and of the limits Parliament set on the peacetime jurisdiction of courts-martial over capital crimes in the first Mutiny Act, 1 Wm. & Mary, ch. 5 (1689), and having experienced the military excesses of the Crown in colonial America, the Framers harbored a deep distrust of executive military power and military tribunals. See *Reid* v. *Covert,* 354 U. S. 1, 23–24 (1957) (plurality); *Lee* v. *Madigan,* 358 U. S. 228, 232 (1959). It follows, Loving says, that the Framers intended that Congress alone should possess the power to decide what aggravating factors justify sentencing a member of the Armed Forces to death.

We have undertaken before, in resolving other issues, the difficult task of interpreting Clause 14 by drawing upon English constitutional history. See, *e. g., Reid, supra,* at 23–30; *O'Callahan* v. *Parker,* 395 U. S. 258, 268–272 (1969) (determining that courts-martial only had jurisdiction of service-connected crimes); *Solorio* v. *United States,* 483 U. S. 435, 442–446 (1987) (overruling *O'Callahan* and taking issue with its historical analysis). Doing so here, we find that, although there is a grain of truth in Loving's historical arguments, the struggle of Parliament to control military tribunals and the lessons the Framers drew from it are more complex than he suggests. The history does not require us to read Clause 14 as granting to Congress an exclusive, nondelegable power to determine military punishments. If anything, it appears that England found security in divided authority, with Parliament at times ceding to the Crown the task of fixing military punishments. From the English experience the Framers understood the necessity of balancing efficient military discipline, popular control of a standing army, and the rights of soldiers; they perceived the risks inherent in assigning the task to one part of the Government to the exclusion of another; and they knew the resulting parliamentary practice of delegation. The Framers' choice in Clause 14 was to give Congress the same flexibility to exercise or share power as times might demand.

In England after the Norman Conquest, military justice was a matter of royal prerogative. The rudiments of law in English military justice can first be seen in the written orders issued by the King for various expeditions. Winthrop 17–18. For example, in 1190 Richard I issued an ordinance outlining six offenses to which the crusaders would be subject, including two punishable by death: "Whoever shall slay a man on ship-board, he shall be bound to the dead man and thrown into the sea. If he shall slay him on land he shall be bound to the dead man and buried in the earth." Ordinance of Richard I—A. D. 1190, reprinted in *id.*, at 903. The first comprehensive articles of war were those declared by Richard II at Durham in 1385 and Henry V at Mantes in 1419, which decreed capital offenses that not only served military discipline but also protected foreign noncombatants from the ravages of war. T. Meron, Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages 91–93 (1993). Articles of War, sometimes issued by military commanders acting under royal commission in the ensuing centuries, Winthrop 19, were not fixed codes, at least through the 17th century; rather, "each war, each expedition, had its own edict," which lost force after the cessation of hostilities and the disbanding of the army that had been formed. J. Pipon & J. Collier, Manual of Military Law 14 (3d rev. ed. 1863).

Thus, royal ordinances governed the conduct of war, but the common law did not countenance the enforcement of military law in times of peace "when the king's courts [were] open for all persons to receive justice according to the laws of the land." 1 W. Blackstone, Commentaries *413. See also M. Hale, History of the Common Law of England 25–27 (C. Gray ed. 1971) (describing efforts of Parliament and the common-law courts to limit the jurisdiction of the military Courts of the Constable and the Marshal).

> "The Common Law made no distinction between the crimes of soldiers and those of civilians in time of peace. All subjects were tried alike by the same civil courts, so 'if a life-guardsman deserted, he could only be sued for breach of contract, and if he struck his officer he was only liable to an indictment or action of battery.'" *Reid, supra,* at 24, n. 44 (quoting 2 J. Campbell, Lives of the Chief Justices of England 91 (1849)).

See also 1 T. Macaulay, History of England 272 (n. d.) (hereinafter Macaulay).

The triumph of civil jurisdiction was not absolute, however. The political disorders of the 17th century ushered in periods of harsh military justice, with soldiers and at times civilian rebels punished, even put to death, under the summary decrees of courts-martial. See C. Clode, Administration of Justice Under Military and Martial Law 20–42 (1872) (hereinafter Clode). Cf. Petition of Right of 1627, 3 Car. I, ch. 1 (protesting court-martial abuses). Military justice was brought under the rule of parliamentary law in 1689, when William and Mary accepted the Bill of Rights requiring Parliament's consent to the raising and keeping of armies. In the Mutiny Act of 1689, Parliament declared the general principle that "noe Man may be forejudged of Life or Limbe or subjected to any kinde of punishment by Martiall Law or in any other manner then by the Judgement of his Peeres and according to the knowne and Established Laws of this Realme," but decreed that "Soldiers who shall Mutiny or stirr up Sedition or shall desert Their Majestyes Service be brought to a more Exemplary and speedy Punishment than the usuall Forms of Law will allow," and "shall suffer Death or such other Punishment as by a Court-Martiall shall be Inflicted." 1 Wm. & Mary, ch. 5.

In one sense, as Loving wants to suggest, the Mutiny Act was a sparing exercise of parliamentary authority, since only the most serious domestic offenses of soldiers were made capital, and the militia was exempted. See *Solorio, supra,* at 442. He misunderstands the Mutiny Act of 1689, however, in arguing that it bespeaks a special solicitude for the rights of soldiers and a desire of Parliament to exclude Executive power over military capital punishment.

The Mutiny Act, as its name suggests, came on the heels of the mutiny of Scottish troops loyal to James II. 3 Macaulay 45–49. The mutiny occurred at a watershed time. Menaced by great continental powers, England had come to a grudging recognition that a standing army, long decried as an instrument of despotism, had to be maintained on its soil. The mutiny cast in high relief the dangers to the polity of a standing army turned bad. Macaulay describes the sentiment of the time:

> "There must then be regular soldiers; and, if there were to be regular soldiers, it must be indispensable, both to their efficiency, and to the security of every other class, that they should be kept under a strict discipline. An ill disciplined army . . . [is] formidable only to the country which it is paid to defend. A strong line of demarcation must therefore be drawn between the soldiers and the rest of the community. For the sake of public freedom, they must, in the midst of freedom, be placed under a despotic rule. They must be subject to a sharper penal code, and to a more stringent code of procedure, than are administered by the ordinary tribunals." *Id.,* at 50.

The Mutiny Act, then, was no measure of leniency for soldiers. With its passage, "the Army of William III. was governed under a severer Code than that made by his predecessors under the Prerogative authority of the Crown. The Mutiny Act, without displacing the Articles of War and those Military Tribunals under which the Army had hitherto been governed, gave statutory sanction to the infliction of Capital Punishments for offences rather Political than Military, and which had rarely been so punished under Prerogative authority." Clode 9–10. See also Duke & Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 13 Vand. L. Rev. 435, 443, and n. 40 (1960) (noting that the Articles of War of 1662 and 1686 prohibited the infliction in peacetime of punishment costing life or limb). Indeed, it was the Crown that later tempered the excesses of courts-martial wielding the power of capital punishment. It did so by stipulating in the Articles of War (which remained a matter of royal prerogative) that all capital sentences be sent to it for revision or approval. Clode 9–10.

Popular suspicion of the standing army persisted, 5 Macaulay 253–273, 393, and Parliament authorized the Mutiny Acts only for periods of six months and then a year, 3 *id.*, at 51–53. But renewed they were time and again, and Parliament would alter the power of courts-martial to impose the death penalty for peacetime offenses throughout the next century. It withdrew the power altogether in 1713, 12 Anne, ch. 13, § 1, only to regret the absence of the penalty during the rebellion of 1715, Clode 49. The third of the Mutiny Acts of 1715 subjected the soldier to capital punishment for a wide array of peacetime offenses related to political disorder and troop discipline. *Id.*, at 50. And, for a short time in the 18th century, Parliament allowed the Crown to invest courts-martial with a general criminal jurisdiction over soldiers even at home, placing no substantive limit on the penalties that could be imposed; until 1718, that jurisdiction was superior to civil courts. *Id.*, at 52–53. The propriety of that general jurisdiction within the kingdom was questioned, and the jurisdiction was withdrawn in 1749. *Id.*, at 53. Nevertheless, even as it continued to adjust the scope of military jurisdiction at home, Parliament entrusted broad powers to the Crown to define and punish military crimes abroad. In 1713, it gave statutory sanction to the Crown's longstanding practice of issuing Articles of War without limiting the kind of punishments that might be imposed; and, in the same Act, it delegated the power to "erect and constitute Courts Martial with Power to try hear and determine any Crime or Offence by such Articles of War and inflict Penalties by Sentence or Judgement of the same in any of Her Majesties Dominions beyond the Seas or elsewhere beyond the Seas (except in the Kingdom of Ireland) . . . as might have been done by Her Majesties Authority beyond the Seas in Time of War." 12 Anne, ch. 13, § 43; Winthrop 20. Cf. Duke & Vogel, *supra*, at 444 (noting that Parliament in 1803 gave statutory authority to the Crown to promulgate Articles of War applicable to troops stationed in England as well). See *Solorio*, 483 U. S., at 442 (discussing a provision in the British Articles of War of 1774 providing court-martial jurisdiction of civilian offenses by soldiers).

As Loving contends, and as we have explained elsewhere, the Framers well knew this history, and had encountered firsthand the abuses of military law in the colonies. See *Reid*, 354 U. S., at 27–28. As many were themselves veterans of the Revolutionary War, however, they also knew the imperatives of military discipline. What they distrusted were not courts-martial *per se*, but military justice dispensed by a commander unchecked by the civil power in proceedings so summary as to be lawless. The latter was the evil that caused Blackstone to declare that "martial law"—by which he, not observing the modern distinction between military and martial law, meant decrees of courts-martial disciplining soldiers in wartime—"is built upon no settled principles, but is entirely arbitrary in its decisions, [and] is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law." 1 Blackstone's Commentaries *413. See also Hale, History of the Common Law of England, at 26–27; Clode 21 (military law in early 17th-century England amounted to "the arbitrary right to punish or destroy, without legal trial, any assumed delinquent"). The partial security Englishmen won against such abuse in 1689 was to give Parliament, preeminent guardian of the British constitution, primacy in matters of military law. This fact does not suggest, however, that a legislature's power must be exclusive. It was for Parliament, as it did in the various Mutiny Acts, to designate as the times required what peacetime offenses by soldiers deserved the punishment of death; and it was for Parliament, as it did in 1713, to delegate the authority to define wartime offenses and devise their punishments, including death. The Crown received the delegated power and the concomitant responsibility for its prudent exercise. The lesson from the English constitutional experience was that Parliament must have the primary power to regulate the Armed Forces and to determine the punishments that could be imposed upon soldiers by courts-martial. That was not inconsistent, however, with the further power to divide authority between it and the Crown as conditions might warrant.

Far from attempting to replicate the English system, of course, the Framers separated the powers of the Federal Government into three branches to avoid dangers they thought latent or inevitable in the parliamentary structure. The historical necessities and events of the English constitutional experience, though, were familiar to them and inform our understanding of the purpose and meaning of constitutional provisions. As we have observed before, with this experience to consult they elected not to "freeze court-martial usage at a particular time" for all ages following, *Solorio, supra,* at 446, nor did they deprive Congress of the services of the Executive in establishing rules for the governance of the military, including rules for capital punishment. In the words of Alexander Hamilton, the power to regulate the Armed Forces, like other powers related to the common defense, was given to Congress

> "without limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence." The Federalist No. 23, at 147 (emphasis deleted).

The later-added Bill of Rights limited this power to some degree, cf. *Burns* v. *Wilson*, 346 U. S. 137, 140 (1953) (plurality opinion); *Chappell* v. *Wallace*, 462 U. S. 296, 300 (1983), but did not alter the allocation to Congress of the "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military," *Solorio*, 483 U. S., at 447–448.

Under Clause 14, Congress, like Parliament, exercises a power of precedence over, not exclusion of, Executive authority. Cf. *United States* v. *Eliason*, 16 Pet. 291, 301 (1842) ("The power of the executive to establish rules and regulations for the government of the army, is undoubted"). This power is no less plenary than other Article I powers, *Solorio*, *supra*, at 441, and we discern no reasons why Congress should have less capacity to make measured and appropriate delegations of this power than of any other, see *Skinner* v. *Mid-America Pipeline Co.*, 490 U. S. 212, 220–221 (1989)

(Congress may delegate authority under the taxing power); cf. *Lichter* v. *United States,* 334 U. S. 742, 778 (1948) (general rule is that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes") (emphasis deleted). Indeed, it would be contrary to precedent and tradition for us to impose a special limitation on this particular Article I power, for we give Congress the highest deference in ordering military affairs. *Rostker* v. *Goldberg,* 453 U. S. 57, 64–65 (1981). And it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority. We decline to import into Clause 14 a restrictive nondelegation principle that the Framers left out.

There is no absolute rule, furthermore, against Congress' delegation of authority to define criminal punishments. We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations "confin[e] themselves within the field covered by the statute." *United States* v. *Grimaud,* 220 U. S. 506, 518 (1911). See also *Touby* v. *United States,* 500 U. S. 160 (1991). The exercise of a delegated authority to define crimes may be sufficient in certain circumstances to supply the notice to defendants the Constitution requires. See *M. Kraus & Bros., Inc.* v. *United States,* 327 U. S. 614, 622 (1946). In the circumstances presented here, so too may Congress delegate authority to the President to define the aggravating factors that permit imposition of a statutory penalty, with the regulations providing the narrowing of the death-eligible class that the Eighth Amendment requires.

In 1950, Congress confronted the problem of what criminal jurisdiction would be appropriate for Armed Forces of colossal size, stationed on bases that in many instances were small societies unto themselves. Congress, confident in the procedural protections of the UCMJ, gave to courts-martial jurisdiction of the crime of murder. Cf. *Solorio, supra,* at 450–451 (Congress may extend court-martial jurisdiction to any criminal offense committed by a service member during his period of service). It further declared the law that service members who commit premeditated and felony murder may be sentenced to death by a court-martial. There is nothing in the constitutional scheme or our traditions to prohibit Congress from delegating the prudent and proper implementation of the capital murder statute to the President acting as Commander in Chief.

B

Having held that Congress has the power of delegation, we further hold that it exercised the power in Articles 18 and 56 of the UCMJ. Article 56 specifies that "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." 10 U. S. C. § 856. Article 18 states that a court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by" the Code. § 818. As the Court of Military Appeals pointed out in *Curtis,* for some decades the President has used his authority under these Articles to increase the penalties for certain noncapital offenses if aggravating circumstances are present. For example, by regulation, deserters who are apprehended are punished more severely than those who surrender; drunken drivers suffer a harsher fate if they cause an accident resulting in the death of a victim; and the punishment of thieves is graded by the value of the stolen goods. See *Curtis,* 32 M. J., at 261. The President has thus provided more precision in sentencing than is provided by the statute, while remaining within statutory bounds. This past practice suggests that Articles 18 and 56 support as well an authority in the President to restrict the death sentence to murders in which certain aggravating circumstances have been established.

There is yet a third provision of the UCMJ indicative of congressional intent to delegate this authority to the President. Article 36 of the UCMJ, which gives the President the power to make procedural rules for courts-martial, provides:

> "Pretrial, trial, and post-trial procedures, including modes of proof, for [courts martial] . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U. S. C. § 836(a).

Although the language of Article 36 seems further afield from capital aggravating factors than that of Article 18 or 56, it is the provision that a later Congress identified as the source of Presidential authority to prescribe these factors. In 1985, Congress enacted Article 106a of the UCMJ, 10 U. S. C. § 906a, which authorized the death penalty for espionage. The Article requires a finding of an aggravating factor if the accused is to be sentenced to death; it enumerates three such factors, but allows death to be decreed on "[a]ny other factor that may be prescribed by the President by regulations under section 836 of this title (article 36)." § 906a(c)(4). Article 106a itself, then, is premised on the President's having authority under Article 36 to prescribe capital aggravating factors, and "'[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.'" *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 118, n. 13 (1980) (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969)). Whether or not Article 36 would stand on its own as the source of the delegated power, we hold that Articles 18, 36, and 56 together give clear authority to the President for the promulgation of RCM 1004.

Loving points out that the three Articles were enacted as part of the UCMJ in 1950, well before the need for eliminating absolute discretion in capital sentencing was established in *Furman* v. *Georgia,* 408 U. S. 238 (1972), and the cases that followed. (Slight amendments to the Articles have been made since but are not relevant here.) In 1950, he argues, Congress could not have understood that it was giving the President the authority to bring an otherwise invalid capital murder statute in line with Eighth Amendment strictures. Perhaps so, but *Furman* did not somehow undo the prior delegation. What would have been an act of leniency by the President prior to *Furman* may have become a constitutional necessity thereafter, see *supra,* at 755–756, but the fact remains the power to prescribe aggravating circumstances has resided with the President since 1950.

C

It does not suffice to say that Congress announced its will to delegate certain authority. Congress as a general rule must also "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J. W. Hampton, Jr., & Co.* v. *United States,* 276 U. S. 394, 409 (1928); *Touby,* 500 U. S., at 165. The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes. *Field,* 143 U. S., at 693–694. Though in 1935 we struck down two delegations for lack of an intelligible principle, *A. L. A. Schecter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935), and *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935), we have since upheld, without exception, delegations under standards phrased in sweeping terms. See, *e. g., National Broadcasting Co.* v. *United States,* 319 U. S. 190, 216–217, 225–226 (1943) (upholding delegation to the Federal Communications Commission to regulate radio broadcasting according to "public interest, convenience, or necessity"). Had the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving's last argument that Congress failed to provide guiding principles to the President might have more weight. We find no fault, however, with the delegation in this case.

In *United States* v. *Curtis*, the Court of Military Appeals discerned a principle limiting the President's discretion to define aggravating factors for capital crimes in Article 36: namely, the directive that regulations the President prescribes must "apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter," 10 U. S. C. § 836(a). We think, however, that the question to be asked is not whether there was any explicit principle telling the President how to select aggravating factors, but whether any such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority. First, the delegation is set within boundaries the President may not exceed. Second, the delegation here was to the President in his role as Commander in Chief. Perhaps more explicit guidance as to how to select aggravating factors would be necessary if delegation were made to a newly created entity without independent authority in the area. Cf. *Mistretta*, 488 U. S., at 374–379 (upholding delegation to the United States Sentencing Commission because of detailed congressional directives channeling agency discretion). The President's duties as Commander in Chief, however, require him to take responsible and continuing action to superintend the military, including the courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply "where the entity exercising the delegated authority itself possesses independent authority over the subject matter," *United States* v. *Mazurie*, 419 U. S.

544, 556–557 (1975). See also *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319–322 (1936). Cf. *Swaim* v. *United States*, 165 U. S. 553, 557–558 (1897) (President has inherent authority to convene courts-martial). Like the Court of Military Appeals, *Curtis*, 32 M. J., at 263, n. 9, we need not decide whether the President would have inherent power as Commander in Chief to prescribe aggravating factors in capital cases. Once delegated that power by Congress, the President, acting in his constitutional office of Commander in Chief, had undoubted competency to prescribe those factors without further guidance. "The military constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff* v. *Willoughby*, 345 U. S. 83, 94 (1953), and the President can be entrusted to determine what limitations and conditions on punishments are best suited to preserve that special discipline.

It is hard to deem lawless a delegation giving the President broad discretion to prescribe rules on this subject. From the early days of the Republic, the President has had congressional authorization to intervene in cases where courts-martial decreed death. American Articles of War of 1806, Art. 65, reprinted in Winthrop 976, 982. It would be contradictory to say that Congress cannot further empower him to limit by prospective regulation the circumstances in which courts-martial can impose a death sentence. Specific authority to make rules for the limitation of capital punishment contributes more toward principled and uniform military sentencing regimes than does case-by-case intervention, and it provides greater opportunity for congressional oversight and revision.

Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes. The delegation to the President as Commander in Chief of the authority to prescribe aggravating factors was in all respects consistent with these precepts, and the promulgation of RCM 1004 was well within the delegated authority. Loving's sentence was lawful, and the judgment of the Court of Appeals for the Armed Forces is affirmed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring.

As JUSTICE SCALIA correctly points out, petitioner has not challenged the power of the tribunal to try him for a capital offense. *Post,* at 775. It is important to add to this observation that petitioner's first victim was a member of the Armed Forces on active duty and that the second was a retired serviceman who gave petitioner a ride from the barracks on the same night as the first killing. Brief for United States 5. On these facts, this does not appear to be a case in which petitioner could appropriately have raised the question whether the holding in *Solorio* v. *United States,* 483 U. S. 435 (1987), should be extended to reach the imposition of the death penalty for an offense that did not have the "service connection" required prior to the change in the law effected in that case. *Id.,* at 451 (STEVENS, J., concurring in judgment).

The question whether a "service connection" requirement should obtain in capital cases is an open one both because *Solorio* was not a capital case, and because *Solorio*'s review of the historical materials would seem to undermine any contention that a military tribunal's power to try capital offenses must be as broad as its power to try noncapital ones. See *id.,* at 442–446. Moreover, the question is a substantial one because, when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians.

As a consequence of my conclusion that the "service connection" requirement has been satisfied here, I join not only the Court's analysis of the delegation issue, but also its disposition of the case. By joining in the Court's opinion, however, I do not thereby accept the proposition that our decision in *Solorio* must be understood to apply to capital offenses. Nor do I understand the Court's decision to do so. That question, as I have explained, remains to be decided.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR joins, concurring in part and concurring in the judgment.

I join the Court's opinion, except that with respect to Part IV thereof I join only subparts B and C.

The discussion of English history that features so prominently in the Court's discussion of Congress's power to grant the authority at issue to the President is in my view irrelevant. To be sure, there is ample precedent in our cases for looking to the history of English courts-martial—but not where the question is of the sort before us today. We have surveyed that history for the purpose of establishing the permissible scope of the jurisdiction of military tribunals over certain classes of defendants and offenses, see, *e. g., Solorio* v. *United States,* 483 U. S. 435, 442–446 (1987); *Lee* v. *Madigan,* 358 U. S. 228, 232 (1959); *Reid* v. *Covert,* 354 U. S. 1, 23–27 (1957) (plurality); see also *Parker* v. *Levy,* 417 U. S. 733, 745 (1974). This case does not present such a question. Petitioner does not assert that tradition establishes his offense to be, in its nature, beyond the jurisdiction of military courts, or that courts-martial are historically incapable of adjudicating capital offenses. His arguments are altogether different: that Congress cannot authorize the President to establish "aggravating factors" designed to carry out the narrowing function that (we assume) is necessary for imposition of a capital sentence; and that, even if Congress *can* give the President authority to perform this function, such authorization has not been effected by the statutes upon which the Government relies.

I do not see how consideration of those arguments profits from analysis of the historical sharing of power between Parliament and the English throne. William and Mary's acceptance of the Bill of Rights, and Parliament's enactment of the Mutiny Act of 1689, see *ante,* at 762–765, are presumably significant occurrences for students of the unwritten English constitution. Our written Constitution does not require us to trace out that history; it provides, in straightforward fashion, that "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces," U. S. Const., Art. I, §8, cl. 14, and as the Court notes, see *ante,* at 767–768, it does not set forth any special limitation on Congress's assigning to the President the task of implementing the laws enacted pursuant to that power. And it would be extraordinary simply to infer such a special limitation upon tasks given to the President as Commander in Chief, where his inherent powers are clearly extensive.

In drafting the Constitution, the Framers were not seeking to replicate in America the government of England; indeed, they set their plan of government out in writing in part to make clear the ways in which it was different from the one it replaced. The Court acknowledges this, see *ante,* at 766, but nonetheless goes on to treat the form of English government as relevant to determining the limitations upon Clause 14's grant of power to Congress. I would leave this historical discussion aside. While it is true, as the Court demonstrates, that the scheme of assigned responsibility here conforms to English practices, that is so *not* because Clause 14 requires such conformity, but simply because what seemed like a good arrangement to Parliament has seemed like a good arrangement to Congress as well.

I have one point of definition or conceptualization, which applies to those portions of the opinion that I have joined. While it has become the practice in our opinions to refer to "unconstitutional delegations of legislative authority" versus "lawful delegations of legislative authority," in fact the latter category does not exist. Legislative power is nondelegable. Congress can no more "delegate" some of its Article I power to the Executive than it could "delegate" some to one of its committees. What Congress does is to *assign responsibilities* to the Executive; and when the Executive undertakes those assigned responsibilities it acts, not as the "delegate" of Congress, but as the agent of the People. At some point the responsibilities assigned can become so extensive and so unconstrained that Congress has in effect delegated its legislative power; but until that point of excess is reached there exists, not a "lawful" delegation, but no delegation at all.

JUSTICE THOMAS, concurring in the judgment.

It is not clear to me that the extensive rules we have developed under the Eighth Amendment for the prosecution of civilian capital cases, including the requirement of proof of aggravating factors, necessarily apply to capital prosecutions in the military, cf. *Chappell* v. *Wallace*, 462 U. S. 296, 300–302 (1983), and this Court has never so held, see *Schick* v. *Reed*, 419 U. S. 256, 260 (1974).* I am therefore not certain that this case even raises a delegation question, for if Loving can constitutionally be sentenced to death without proof of aggravating factors, he surely cannot claim that the President violated the Constitution by promulgating aggravating factors that afforded more protection than that to which Loving is constitutionally entitled.

Like the majority, I conclude that the Government prevails even if we assume, without deciding, that aggravating factors are required in this context. There is abundant author-

---

*Although the applicability of *Furman* v. *Georgia*, 408 U. S. 238 (1972), and its progeny to the military is an open question, the United States surprisingly makes no argument that the military is exempt from the byzantine rules that we have imposed upon the States in their administration of the death penalty.

ity for according Congress and the President sufficient deference in the regulation of military affairs to uphold the delegation here, and I see no need to resort to our nonmilitary separation-of-powers and "delegation doctrine" cases in reaching this conclusion. I write separately to explain that by concurring in the judgment in this case, I take no position with respect to Congress' power to delegate authority or otherwise alter the traditional separation of powers outside the military context.

In light of Congress' express constitutional authority to regulate the Armed Forces, see U. S. Const., Art. I, §8, cl. 14, and the unique nature of the military's mission, we have afforded an unparalleled degree of deference to congressional action governing the military. See *Rostker* v. *Goldberg,* 453 U. S. 57, 64–65 (1981). "[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise," *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 17 (1955), and this Court has recognized the limits on its own competence in advancing this core national interest, see *Gilligan* v. *Morgan,* 413 U. S. 1, 10 (1973). Mindful of the factors that "differentiate military society from civilian society," we have concluded that the Constitution permits Congress "to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker* v. *Levy,* 417 U. S. 733, 756 (1974). This heightened deference extends not only to congressional action but also to executive action by the President, who by virtue of his constitutional role as Commander in Chief, see U. S. Const., Art. II, §2, cl. 1, possesses shared authority over military discipline. See *Schlesinger* v. *Ballard,* 419 U. S. 498, 510 (1975) ("The responsibility for determining how best our Armed Forces shall attend to th[e] business [of fighting or preparing to fight wars] rests with Congress and with the President") (citations omitted). See also *Brown* v. *Glines,* 444 U. S. 348, 360 (1980)

("Both Congress and this Court have found that the special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale. In construing a statute that touches on such matters, therefore, courts must be careful not to 'circumscribe the authority of military commanders to an extent never intended by Congress' ") (citations omitted). Under these and many similar cases reviewing legislative and executive control of the military, the sentencing scheme at issue in this case, and the manner in which it was created, are constitutionally unassailable.

On a separate point, I agree with JUSTICE SCALIA that the majority's extended analysis of the division of authority between the English Parliament and the Crown with regard to regulation of the military, see *ante*, at 759–766, has no relevance to this case. It is true that we frequently consult English history and common law in attempting to determine the content of constitutional provisions, but the majority fails to cite a single separation-of-powers case in which we have relied on the structure of the English Government in attempting to understand the governmental structure erected by the Framers of the Constitution. Nor does the majority cite any historical evidence, whether from the constitutional debates, the Federalist Papers, or some other source, that demonstrates that the Framers sought to embrace, or at least actively considered, the English system of shared power over the military. If the majority pointed to some basis for conducting the inquiry that it does, I might be willing to accept its analysis. Instead, the majority repeatedly substitutes *ipse dixit* for historical evidence. See, *e. g., ante*, at 761 ("From the English experience the Framers . . . knew the . . . parliamentary practice of delegation" and "[t]he Framers' choice in Clause 14 was to give Congress the same flexibility to exercise or share power"); *ante*, at 765 ("the Framers well knew this history"); *ante*, at 766 ("The historical necessities and events of the English constitutional experience . . . were familiar to [the Framers] and inform our understanding of the purpose and meaning of constitutional provisions"). I have no doubt that the Framers were well versed in English history. But it is too simplistic for purposes of constitutional analysis to draw conclusions about the allocation of constitutional authority among the branches of the United States Government from mere speculation about the Framers' familiarity with English military history and the significance that they attached to it.

AUCIELLO IRON WORKS, INC. *v.* NATIONAL LABOR RELATIONS BOARD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 95–668. Argued April 22, 1996—Decided June 3, 1996

The day after petitioner Auciello Iron Works's outstanding contract offer was accepted by its employees' collective-bargaining representative (Union), Auciello disavowed the agreement because of its good-faith doubt, based on knowledge acquired before the offer's acceptance, that a majority of its employees supported the Union. The National Labor Relations Board ruled, *inter alia,* that Auciello's withdrawal from it was an unfair labor practice in violation of the National Labor Relations Act and ordered that the agreement be reduced to a formal written instrument. The First Circuit enforced the order as reasonable.

Held: The Board reasonably concluded that an employer commits an unfair labor practice when it disavows a collective-bargaining agreement because of a good-faith doubt about a union's majority status at the time the contract was made, when the doubt arises from facts known to the employer before the union accepted its contract offer. Pp. 785–792.

(a) In its efforts to achieve the Act's object of industrial peace and stability fostered by collective-bargaining relationships, see, *e. g., Fall River Dyeing & Finishing Corp.* v. *NLRB,* 482 U. S. 27, 38, the Board has held that a union is entitled to, *inter alia,* a conclusive presumption of majority status during a collective-bargaining agreement's term, up to three years, see, *e. g., NLRB* v. *Burns Int'l Security Services, Inc.,* 406 U. S. 272, 290, n. 12. Upon the contract's expiration, the employer may rebut the presumption of majority status by showing that it has a good-faith doubt, founded on a sufficient objective basis, of the union's majority support. *NLRB* v. *Curtin Matheson Scientific, Inc.,* 494 U. S. 775, 778. Auciello's assertion that an employer may raise the latter defense even after a contract period has apparently begun to run upon a union's acceptance of an outstanding offer is rejected. Pp. 785–787.

(b) The same need for repose that first prompted the Board to adopt the rule presuming a union's majority status during its collective-bargaining agreement's term also led the Board in this case to rule out an exception for the benefit of an employer with doubts arising from facts antedating the contract. The Board's judgment in the matter is entitled to prevail. Auciello's argument for case-by-case determinations of the appropriate time for asserting a good-faith doubt in place of the Board's bright-line rule cutting off the opportunity at the moment of apparent contract formation fails to point up anything unreasonable in the Board's position. Its approach generally allows companies an adequate chance to act on their preacceptance doubts before contract formation, and Auciello's view would encourage bad-faith bargaining by employers. The Board could reasonably conclude that giving employers flexibility in raising their good-faith doubts would not be worth skewing bargaining relationships by such one-sided leverage, and the fact that any collective-bargaining agreement might be vulnerable to such a postformation challenge would hardly serve the Act's goal of achieving industrial peace by promoting stable collective-bargaining relationships. Moreover, rejection of the Board's position is not compelled by the statutory right of employees to bargain collectively through representatives of their own choosing and to refrain from doing so. The Board is entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, and there is nothing unreasonable in giving a short leash to an employer as vindicator of its employees' organizational freedom. Pp. 787–790.

(c) *Garment Workers* v. *NLRB*, 366 U. S. 731, 738–739, does not compel reversal; its rule concerning recognition agreements is not inconsistent with this decision. The Board reasonably found an employer's precontractual, good-faith doubt inadequate to support an exception to the conclusive presumption arising at the moment a collective-bargaining contract offer has been accepted. Pp. 791–792.

60 F. 3d 24, affirmed.

SOUTER, J., delivered the opinion for a unanimous Court.

John D. O'Reilly III argued the cause and filed a brief for petitioner.

Richard H. Seamon argued the cause for respondent. With him on the brief were *Solicitor General Days*, *Deputy Solicitor General Wallace*, *Linda Sher*, *Norton J. Come*, and *John Emad Arbab*.*

JUSTICE SOUTER delivered the opinion of the Court.

The question here is whether an employer may disavow a collective-bargaining agreement because of a good-faith

---

**Jonathan Hiatt*, *Marsha Berzon*, *David Silberman*, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

doubt about a union's majority status at the time the contract was made, when the doubt arises from facts known to the employer before its contract offer had been accepted by the union. We hold that the National Labor Relations Board (NLRB or Board) reasonably concluded that an employer challenging an agreement under these circumstances commits an unfair labor practice in violation of §§ 8(a)(1) and (5) of the National Labor Relations Act (NLRA or Act), 49 Stat. 452, 453, as amended, 29 U. S. C. §§ 158(a)(1) and (5).

I

Petitioner Auciello Iron Works of Hudson, Massachusetts, had 23 production and maintenance employees during the period in question. After a union election in 1977, the NLRB certified Shopmen's Local No. 501, a/w International Association of Bridge, Structural, and Ornamental Iron Workers, AFL–CIO (Union), as the collective-bargaining representative of Auciello's employees. Over the following years, the company and the Union were able to negotiate a series of collective-bargaining agreements, one of which expired on September 25, 1988. Negotiations for a new one were unsuccessful throughout September and October 1988, however, and when Auciello and the Union had not made a new contract by October 14, 1988, the employees went on strike. Negotiations continued, nonetheless, and, on November 17, 1988, Auciello presented the Union with a complete contract proposal. On November 18, 1988, the picketing stopped, and nine days later, on a Sunday evening, the Union telegraphed its acceptance of the outstanding offer. The very next day, however, Auciello told the Union that it doubted that a majority of the bargaining unit's employees supported the Union, and for that reason disavowed the collective-bargaining agreement and denied it had any duty to continue negotiating. Auciello traced its doubt to knowledge acquired before the Union accepted the contract offer, including the facts that 9 employees had crossed the picket line, that 13 employees had given it signed forms indicating their resignation from the Union, and that 16 had expressed dissatisfaction with the Union.

In January 1989, the Board's General Counsel issued an administrative complaint charging Auciello with violation of §§ 8(a)(1) and (5) of the NLRA.[1] An Administrative Law Judge found that a contract existed between the parties and that Auciello's withdrawal from it violated the Act. 303 N. L. R. B. 562 (1991). The Board affirmed the Administrative Law Judge's decision[2]; it treated Auciello's claim of

---

[1] Section 8(a) of the NLRA provides:

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U. S. C. § 158(a).

Section 7 of the Act provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." 29 U. S. C. § 157.

[2] The Board has developed a number of criteria to assess whether a collective-bargaining contract has been formed, see, *e. g., Appalachian Shale Products Co.,* 121 N. L. R. B. 1160 (1958), which may not always coincide with those that would govern in the general area of contract law, see *Ben Franklin Nat. Bank,* 278 N. L. R. B. 986, 993–994 (1986). We accept for purposes of deciding this case the Board's conclusion that a contract was formed here within the meaning of the Act. Our review of this case is thus limited to the narrow question whether an employer may withdraw from a collective-bargaining contract once formed when it possessed enough evidence to assert a good-faith doubt about the union's majority status at the time of formation.

Auciello has suggested that the contract itself was invalid *ab initio* because the Union in fact lacked majority support at the time of accept-good-faith doubt as irrelevant and ordered Auciello to reduce the collective-bargaining agreement to a formal written instrument. *Ibid.* But when the Board applied to the Court of Appeals for the First Circuit for enforcement of its order, the Court of Appeals declined on the ground that the Board had not adequately explained its refusal to consider Auciello's defense of good-faith doubt about the Union's majority status. 980 F. 2d 804 (1992). On remand, the Board issued a supplemental opinion to justify its position, 317 N. L. R. B. 364 (1995), and the Court of Appeals thereafter enforced the order as resting on a "policy choice [both] . . . reasonable and . . . quite persuasive." 60 F. 3d 24, 27 (1995). We granted certiorari, 516 U. S. 1086 (1996), and now affirm.

II

A

The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees. See 29 U. S. C. § 141(b); *Fall River Dyeing & Finishing Corp.* v. *NLRB,* 482 U. S. 27, 38 (1987) *(Fall River Dyeing).* To such ends, the Board has adopted various presumptions about the existence of majority support for a union within a bargaining unit, the

---

ance. Because the substantiation required to make this showing is greater than that required to assert a good-faith doubt, see *NLRB* v. *Curtin Matheson Scientific, Inc.,* 494 U. S. 775, 788, n. 8 (1990), the Board has not taken a position on whether such a claim could excuse an employer's decision to repudiate an otherwise valid contract and disavow its duty to bargain with the union. Brief for Respondent 26, n. 7. Auciello concedes that it failed to advance this claim in its answer to the General Counsel's complaint, Tr. of Oral Arg. 6, 28, the Board never considered this question, and Auciello sought certiorari review only of the question whether an employer is bound by a union's acceptance in this context when "the Employer had a reasonable basis for a good faith doubt." Pet. for Cert. i. Accordingly, we conclude that this question is not properly before us and decline to address it.

precondition for service as its exclusive representative. Cf. *id.*, at 37–39. The first two are conclusive presumptions. A union "usually is entitled to a conclusive presumption of majority status for one year following" Board certification as such a representative. *Id.*, at 37. A union is likewise entitled under Board precedent to a conclusive[3] presumption of majority status during the term of any collective-bargaining agreement, up to three years. See *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U. S. 272, 290, n. 12 (1972); see generally R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining § 9, pp. 54–59 (1976). "These presumptions are based not so much on an absolute certainty that the union's majority status will not erode," *Fall River Dyeing*, 482 U. S., at 38, as on the need to achieve "stability in collective-bargaining relationships." *Ibid.* (internal quotation marks omitted). They address our fickle nature by "enabl[ing] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement" without worrying about the immediate risk of decertification and by "remov[ing] any temptation on the part of the employer to avoid good-faith bargaining" in an effort to undermine union support. *Ibid.*

There is a third presumption, though not a conclusive one. At the end of the certification year or upon expiration of the collective-bargaining agreement, the presumption of majority status becomes a rebuttable one. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U. S. 775, 778 (1990); see n. 6, *infra*. Then, an employer may overcome the presumption (when, for example, defending against an unfair labor practice charge) "by showing that, at the time of [its] refusal to bargain, either (1) the union did not *in fact* enjoy majority support, or (2) the employer had a 'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support." *Curtin Matheson, supra*, at 778 (emphasis in original).[4] Auciello asks this Court to hold that it may raise the latter defense even after a collective-bargaining contract period has apparently begun to run upon a union's acceptance of an employer's outstanding offer.

---

[3] This presumption may be overcome only in unusual circumstances, see, *e. g.*, *Brooks* v. *NLRB*, 348 U. S. 96, 98–99 (1954) (union dissolution, *inter alia*); 3 T. Kheel, Labor Law § 13A.04[5], p. 13A–26 (1995); R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining § 9, pp. 56–57 (1976), none of which is present here.

B

The same need for repose that first prompted the Board to adopt the rule presuming the union's majority status during the term of a collective-bargaining agreement also led the Board to rule out an exception for the benefit of an employer with doubts arising from facts antedating the contract. The Board said that such an exception would allow an employer to control the timing of its assertion of good-faith doubt and thus to "'sit' on that doubt and . . . raise it after the offer is accepted." 317 N. L. R. B., at 370. The Board thought that the risks associated with giving employers such "unilatera[l] control [over] a vital part of the collective-bargaining process," *ibid.*, would undermine the stability of the collective-bargaining relationship, *id.*, at 374, and thus outweigh any benefit that might in theory follow from vindicating a doubt that ultimately proved to be sound.

The Board's judgment in the matter is entitled to prevail. To affirm its rule of decision in this case, indeed, there is no need to invoke the full measure of the "considerable deference" that the Board is due, *NLRB* v. *Curtin Matheson Scientific, Inc., supra,* at 786, by virtue of its charge to develop national labor policy, *Beth Israel Hospital* v. *NLRB,* 437 U. S. 483, 500–501 (1978), through interstitial rulemaking that is "rational and consistent with the Act," *Curtin Matheson, supra,* at 787.

---

[4] Auciello maintains that *Curtin Matheson* requires reversal here since it appears that the employer in that case asserted its good-faith doubt after the union's acceptance of the contract offer. Brief for Petitioner 19–21. But the case is not authority on the issue of timing. The question presented was whether the Board "in evaluating an employer's claim that it had a reasonable basis for doubting a union's majority support, *must* presume that striker replacements oppose the union." *Curtin Matheson*, 494 U. S., at 777 (emphasis in original). We did not discuss or consider whether the timing of the employer's assertion should affect the outcome of that case, and the decision does not answer that question.

It might be tempting to think that Auciello's doubt was expressed so soon after the apparent contract formation that little would be lost by vindicating that doubt and wiping the contractual slate clean, if in fact the company can make a convincing case for the doubt it claims. On this view, the loss of repose would be slight. But if doubts about the union's majority status would justify repudiating a contract one day after its ostensible formation, why should the same doubt not serve as well a year into the contract's term? Auciello implicitly agrees on the need to provide some cutoff, but argues that the limit should be expressed as a "reasonable time" to repudiate the contract. Brief for Petitioner 26–32. That is, it seeks case-by-case determinations of the appropriate time for asserting a good-faith doubt in place of the Board's bright-line rule cutting off the opportunity at the moment of apparent contract formation. Auciello's desire is natural, but its argument fails to point up anything unreasonable in the Board's position.

The Board's approach generally allows companies an adequate chance to act on their preacceptance doubts before contract formation, just as Auciello could have acted effectively under the Board's rule in this case. Auciello knew that the picket line had been crossed and that a number of its employees had expressed dissatisfaction with the Union at least nine days before the contract's acceptance, and all of the resignation forms Auciello received were dated at least five days before the acceptance date. During the week preceding the apparent formation of the contract, Auciello had at least three alternatives to doing nothing. It could have withdrawn the outstanding offer and then, like its employees, petitioned for a representation election. See 29 U. S. C. § 159(c)(1)(A)(ii) (employee petitions); § 159(c)(1)(B) (employer petitions); *NLRB* v. *Financial Institution Employees,* 475 U. S. 192, 198 (1986).[5] "[I]f the Board determines, after investigation and hearing, that a question of representation exists, it directs an election by secret ballot and certifies the result." *Ibid.* Following withdrawal, it could also have refused to bargain further on the basis of its good-faith doubt, leaving it to the Union to charge an unfair labor practice, against which it could defend on the basis of the doubt. Cf. *Curtin Matheson,* 494 U. S., at 778. And, of course, it could have withdrawn its offer to allow it time to investigate while it continued to fulfill its duty to bargain in good faith with the Union. The company thus had generous opportunities to avoid the presumption before the moment of acceptance.

There may, to be sure, be cases where the opportunity requires prompt action,[6] but labor negotiators are not the least nimble, and the Board could reasonably have thought the price of making more time for the sluggish was too high, since it would encourage bad-faith bargaining. As Auciello would have it, any employer with genuine doubt about a union's hold on its employees would be invited to go right on bargaining, with the prospect of locking in a favorable contract that it could, if it wished, then challenge. Here, for example, if Auciello had acted before the Union's telegram by withdrawing its offer and declining further negotiation based on its doubt (or petitioning for decertification), flames would have been fanned, and if it ultimately had been obliged to bargain further, a favorable agreement would have been more difficult to obtain. But by saving its challenge until after a contract had apparently been formed, it could not end up with a worse agreement than the one it had. The Board could reasonably say that giving employers some flexibility in raising their scruples would not be worth skewing bargaining relationships by such one-sided leverage, and the fact that any collective-bargaining agreement might be vulnerable to such a postformation challenge would hardly serve the Act's goal of achieving industrial peace by promoting stable collective-bargaining relationships. Cf. *Fall River Dyeing*, 482 U. S., at 38–39; *Franks Bros. Co.* v. *NLRB*, 321 U. S. 702, 705 (1944).

---

[5] We assume, without deciding, that the withdrawal of an offer under these circumstances could not serve as a basis for the filing of an unfair labor practice complaint, which might trigger the "blocking charge" rule that the NLRB concedes would be implicated by an employer's unlawful withdrawal of recognition. See Brief for Respondent 31, n. 10.

[6] We note that in the unusual circumstance in which evidence leading the employer to harbor such a doubt arises at the same time the union accepts the offer, the Board has agreed to examine such occurrences on a case-by-case basis. 317 N. L. R. B. 364, 374–375 (1995).

Nor do we find anything compelling in Auciello's contention that its employees' statutory right "to bargain collectively through representatives of their own choosing" and to refrain from doing so, 29 U. S. C. § 157, compels us to reject the Board's position. Although we take seriously the Act's command to respect "the free choice of employees" as well as to "promot[e] stability in collective-bargaining relationships," *Fall River Dyeing*, *supra*, at 38 (internal quotation marks omitted), we have rejected the position that employers may refuse to bargain whenever presented with evidence that their employees no longer support their certified union. "To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace], it is inimical to it." *Brooks* v. *NLRB*, 348 U. S. 96, 103 (1954). The Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one. There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom.

C

Merits aside, Auciello also claims that the precedent of *Garment Workers* v. *NLRB*, 366 U. S. 731 (1961), compels reversal, but it does not. In *Garment Workers*, we held that a bona fide but mistaken belief in a union's majority status cannot support an employer's agreement purporting to recognize a union newly organized but as yet uncertified. We upheld the Board's rule out of concern that an employer and a union could make a deal giving the union " 'a marked advantage over any other [union] in securing the adherence of employees,' " *id.*, at 738 (quoting *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267 (1938)), thereby distorting the process by which employees elect the bargaining agent of their choice. 366 U. S., at 738–739. Here, in contrast, the Union continued to enjoy a rebuttable presumption of majority support, and the bargaining unit employees had ample opportunity to initiate decertification of the Union but apparently chose not to do so. With entire consistency, the Board may deny employers the power gained from recognizing a union, even when it flows from a good-faith but mistaken belief in a newly organized union's majority status, and at the same time deny them the power to disturb collective-bargaining agreements based on a doubt (without more) that its employees' bargaining agent has retained majority status. Good-faith belief can neither force a union's precipitate recognition nor destroy a recognized union's contracting authority after the fact by intentional delay. There is, indeed, a symmetry in the two positions.

* * *

We hold that the Board reasonably found an employer's precontractual, good-faith doubt inadequate to support an exception to the conclusive presumption arising at the moment a collective-bargaining contract offer has been accepted. We accordingly affirm the judgment of the Court of Appeals for the First Circuit.

It is so ordered.

RICHARDS ET AL. *v.* JEFFERSON COUNTY, ALABAMA, ET AL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 95–386. Argued March 26, 1996—Decided June 10, 1996

Petitioners, who are privately employed in Jefferson County, filed a state-court class action claiming that the county's occupation tax violates the Federal and Alabama Constitutions. In granting the county partial summary judgment, the trial court found that petitioners' state claims were barred by a prior adjudication of the tax in an action brought by Birmingham's acting finance director and the city itself, consolidated with a suit by three county taxpayers, see *Bedingfield* v. *Jefferson County*, 527 So. 2d 1270, but that petitioners' federal claims had not been decided in that case. The county and respondent intervenor argued on appeal that the federal claims were also barred. The State Supreme Court agreed, concluding that res judicata applied because petitioners were adequately represented in the *Bedingfield* action.

Held: Because petitioners received neither notice of, nor sufficient representation in, the *Bedingfield* litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging an allegedly unconstitutional deprivation of their property. Pp. 797–805.

(a) The traditional rule that an extreme application of state-law res judicata principles may be inconsistent with the Federal Constitution, see *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464, 476, reflects the general consensus that one is not bound by a judgment in litigation to which he is not a party. Of course, there is an exception from these principles when there is "privity" between a party to the second case and a party who is bound by an earlier judgment. Pp. 797–799.

(b) Because the *Bedingfield* parties gave petitioners no notice that a suit was pending which would conclusively resolve their legal rights, that proceeding would have a binding effect on them, as absent parties, only if it were so devised and applied as to ensure that those present were of the same class as those absent and that the litigation was so conducted as to ensure the full and fair consideration of the common issue. *Hansberry* v. *Lee*, 311 U. S. 32, 43. Because the *Bedingfield* action plainly does not fit this description, there is no reason to suppose that the court therein took care to protect petitioners' interests in the manner suggested in *Hansberry* or that the *Bedingfield* plaintiffs understood their suit to be on behalf of absent taxpayers. Those plaintiffs did not provide representation sufficient to make up for the fact that petitioners neither participated in, nor had the opportunity to participate in, the earlier action. Pp. 799–802.

(c) This Court may assume that if petitioners had relied on their taxpayer status to complain about an alleged misuse of public funds or about other public action having only an indirect impact on their interests, the State would have enjoyed wide latitude in limiting their opportunity to make their case. However, because petitioners present a federal constitutional challenge to the State's attempt to levy personal funds, the Court is not persuaded that the nature of their actions permits it to deviate from the traditional rule that an extreme application of state-law res judicata principles violates the Federal Constitution. Pp. 802–805.

662 So. 2d 1127, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

William J. Baxley argued the cause for petitioners. With him on the briefs was *Joel E. Dillard.*

William M. Slaughter argued the cause for respondents. With him on the brief was *Richard H. Walston.*[*]

JUSTICE STEVENS delivered the opinion of the Court.

In *Hansberry* v. *Lee*, 311 U. S. 32, 37 (1940), we held that it would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented. The decision of the Supreme Court of Alabama that we review today presents us with the same basic question in a somewhat different context.

I

Jason Richards and Fannie Hill (petitioners) are privately employed in Jefferson County, Alabama. In 1991 they filed a complaint in the Federal District Court challenging the validity of the occupation tax imposed by Jefferson County

---

[*] *Richard Ruda* and *James I. Crowley* filed a brief for the National Association of Counties et al. as *amici curiae* urging affirmance.

Ordinance 1120, which had been adopted in 1987. That action was dismissed as barred by the Tax Injunction Act, 28 U. S. C. § 1341.[1] They then commenced this action in the Circuit Court of Jefferson County.

Petitioners represent a class of all nonfederal employees subject to the county's tax.[2] Petitioners alleged that the tax, which contains a lengthy list of exemptions, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and similar provisions of the Alabama Constitution. Because $10 million of the annual proceeds from the county tax have been pledged to the Birmingham-Jefferson Civic Center for a period of 20 years, the court permitted the center to intervene and support Jefferson County's defense of its tax.

The county moved for summary judgment on the ground that petitioners' claims were barred by a prior adjudication of the tax in an earlier action brought by the acting director of finance for the city of Birmingham and the city itself. That earlier action had been consolidated for trial with a separate suit brought by three county taxpayers, and the Supreme Court of Alabama upheld the tax in the resulting appeal. See *Bedingfield* v. *Jefferson County*, 527 So. 2d 1270 (1988). After examining the course of this prior litigation, the trial court granted the county's motion for summary judgment as to the state constitutional claims, but refused to do so as to the federal claims because they had not been decided by either the trial court or the Alabama Supreme Court in *Bedingfield.*

On appeal, the county argued that the federal claims as well as the state claims were barred by the adjudication in

---

[1] *Richards* v. *Jefferson County*, 789 F. Supp. 369 (ND Ala.), affirmance order, 983 F. 2d 237 (CA11 1992).

[2] They were joined in the action by George Dykes and Joan Dykes, employees of the Federal Government who also work in the county. The Dykes represent a separate class of federal employees whose claims are not before us.

Bedingfield. The Alabama Supreme Court agreed. The majority opinion noted that in Alabama, as in most States, a prior judgment on the merits rendered by a court of competent jurisdiction precludes the relitigation of a claim if there is a "substantial identity of the parties" and if the "same cause of action" is presented in both suits. 662 So. 2d 1127, 1128 (1995). Moreover, the court explained, the prior judgment is generally "'res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit.'" *Ibid.* (quoting *Heiser* v. *Woodruff,* 327 U. S. 726, 735 (1946)).

The Alabama Supreme Court concluded that even though the opinion in *Bedingfield* did not mention any federal issue, the judgment in that case met these requirements. The court gave three reasons for this conclusion: (1) The complaints in the earlier case had alleged that the county tax violated the Equal Protection Clause of the Fourteenth Amendment and an equal protection issue had been argued in the appellate briefs, 662 So. 2d, at 1129; (2) the taxpayers in *Bedingfield* adequately represented petitioners because their respective interests were "essentially identical," 662 So. 2d, at 1130; and (3) in pledging tax revenues and issuing bonds in 1989, the county and the intervenor "could have relied on *Bedingfield* as authoritatively establishing that the county occupational tax was not unconstitutional for the reasons asserted by the *Bedingfield* plaintiffs," 662 So. 2d, at 1130.

Justice Maddox dissented. He agreed with the trial judge that no federal constitutional claim had been adjudicated in *Bedingfield.* 662 So. 2d, at 1130–1131. Moreover, he concluded that the mere fact that the theory advanced by the petitioners in this case could have been asserted in *Bedingfield* constituted an insufficient reason for barring this action. 662 So. 2d, at 1131–1132.

We now conclude that the State Supreme Court's holding that petitioners are bound by the adjudication in *Bedingfield* deprived them of the due process of law guaranteed by the Fourteenth Amendment.[3]

II

State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes. *Postal Telegraph Cable Co.* v. *Newport,* 247 U. S. 464, 475 (1918). We have long held, however, that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is "fundamental in character." *Id.,* at 476.[4]

---

[3] After granting the petition to consider both the equal protection challenge to the tax scheme, and the due process challenge to the Alabama Supreme Court's conclusion that their claims were barred by the doctrine of res judicata, we entered an order dismissing the writ to the extent that it included the equal protection question and directing the parties to address at oral argument only the question whether the application of res judicata afforded petitioners due process. 516 U. S. 983 (1996). Because petitioners raised their due process challenge to the application of res judicata in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review. See *PruneYard Shopping Center* v. *Robins,* 447 U. S. 74, 85–87, n. 9 (1980).

[4] "The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. *Southern Pacific R. R. Co.* v. *United States,* 168 U. S. 1, 48; Greenleaf Ev., §§ 522–523. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. *Windsor* v. *McVeigh,* 93 U. S. 274, 277; *Louisville & Nashville R. R. Co.* v. *Schmidt,* 177 U. S. 230, 236; *Simon* v. *Craft,* 182 U. S. 427, 436. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (*Pennoyer* v. *Neff,* 95 U. S. 714, 733; *Scott* v. *McNeal,* 154 U. S. 34, 46; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 423), so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein." 247 U. S., at 476.

The limits on a state court's power to develop estoppel rules reflect the general consensus "'in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' *Hansberry* v. *Lee*, 311 U. S. 32, 40 (1940). . . . This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.' 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)." *Martin* v. *Wilks*, 490 U. S. 755, 761–762 (1989). As a consequence, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Id.*, at 762; *Blonder-Tongue Laboratories, Inc.* v. *University of Ill. Foundation*, 402 U. S. 313, 329 (1971).

Of course, these principles do not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is "privity" between a party to the second case and a party who is bound by an earlier judgment. For example, a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust. Moreover, although there are clearly constitutional limits on the "privity" exception, the term "privity" is now used to describe various relationships between litigants that would not have come within the traditional definition of that term. See generally Restatement (Second) of Judgments, ch. 4 (1980) (Parties and Other Persons Affected by Judgments).

In addition, as we explained in *Wilks:*

> "We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. See *Hansberry* v. *Lee*, 311 U. S. 32, 41–42 (1940)

> ('class' or 'representative' suits); Fed. Rule Civ. Proc. 23 (same); *Montana* v. *United States,* 440 U. S. 147, 154–155 (1979) (control of litigation on behalf of one of the parties in the litigation). Additionally, where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate pre-existing rights if the scheme is otherwise consistent with due process. See *NLRB* v. *Bildisco & Bildisco,* 465 U. S. 513, 529–530, n. 10 (1984) ('[P]roof of claim must be presented to the Bankruptcy Court . . . or be lost'); *Tulsa Professional Collection Services, Inc.* v. *Pope,* 485 U. S. 478 (1988) (nonclaim statute terminating unsubmitted claims against the estate)." 490 U. S., at 762, n. 2.

Here, the Alabama Supreme Court concluded that res judicata applied because petitioners were adequately represented in the *Bedingfield* action. 662 So. 2d, at 1130. We now consider the propriety of that determination.

III

We begin by noting that the parties to the *Bedingfield* case failed to provide petitioners with any notice that a suit was pending which would conclusively resolve their legal rights. That failure is troubling because, as we explained in *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306 (1950), the right to be heard ensured by the guarantee of due process "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.,* at 314; *Phillips Petroleum Co.* v. *Shutts,* 472 U. S. 797, 812 (1985); *Schroeder* v. *City of New York,* 371 U. S. 208, 212–213 (1962). Nevertheless, respondents ask us to excuse the lack of notice on the ground that petitioners, as the Alabama

Supreme Court concluded, were adequately represented in *Bedingfield*.[5]

Our answer is informed by our decision in *Hansberry* v. *Lee*, 311 U. S., at 40–41. There, certain property owners brought suit to enforce a restrictive covenant that purported to forbid the sale or lease of any property within a defined area to "any person of the colored race." *Id.*, at 37–38. By its terms the covenant was not effective unless signed by the owners of 95 per cent of frontage in the area. At trial, the defendants proved that the signers of the covenant owned only about 54 percent of the frontage. Nevertheless, the trial court held that the covenant was enforceable because the issue had been resolved in a prior suit in which the parties had stipulated that the owners of 95 percent had signed. *Id.*, at 38 (referring to *Burke* v. *Kleiman*, 277 Ill. App. 519 (1934)).

Despite the fact that the stipulation was untrue, the Illinois Supreme Court held that the second action was barred by res judicata. See *Lee* v. *Hansberry*, 372 Ill. 369, 24 N. E. 2d 37 (1939). Because the plaintiff in the earlier case had alleged that she was proceeding "on behalf of herself and on behalf of all other property owners in the district," *id.*, at 372, 24 N. E. 2d, at 39, the Illinois Supreme Court concluded that all members of that "class," including the defendants challenging the stipulation in the present action, were bound by the decree. We reversed.

We recognized the "familiar doctrine . . . that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or . . . the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." *Hansberry,* 311 U. S., at 42–43. We concluded, however, that because the interests of those class members who had been a party to the prior litigation were in conflict with the absent members who were the defendants in the subsequent action, the doctrine of representation of absent parties in a class suit could not support the decree.

---

[5] Of course, mere notice may not suffice to preserve one's right to be heard in a case such as the one before us. The general rule is that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Chase Nat. Bank* v. *Norwalk*, 291 U. S. 431, 441 (1934); but cf. *Penn-Central Merger and N & W Inclusion Cases*, 389 U. S. 486, 505, n. 4 (1968) (noting that absent parties were invited to intervene by the court).

Even assuming that our opinion in *Hansberry* may be read to leave open the possibility that in some class suits adequate representation might cure a lack of notice, but cf., *id.,* at 40; *Eisen* v. *Carlisle & Jacquelin,* 417 U. S. 156, 177 (1974); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S., at 319, it may not be read to permit the application of res judicata here. Our opinion explained that a prior proceeding, to have binding effect on absent parties, would at least have to be "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." 311 U. S., at 43; cf. *Phillips Petroleum Co.* v. *Shutts,* 472 U. S., at 811–812. It is plain that the *Bedingfield* action, like the prior proceeding in *Hansberry* itself, does not fit such a description.

The Alabama Supreme Court concluded that the "*taxpayers* in the *Bedingfield* action adequately represented the interests of the taxpayers here," 662 So. 2d, at 1130 (emphasis added), but the three county taxpayers who were parties in *Bedingfield* did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties. That the acting director of finance for the city of Birmingham also sued in his capacity as both an individual taxpayer and a public official does not change the analysis. Even if we were to assume, as the Alabama Supreme Court did not, that by suing in his official capacity, the finance director intended to represent the pecuniary interests of all city taxpayers, and not simply the corporate interests of the city itself, he did not purport to represent the pecuniary interests of *county* taxpayers like petitioners.[6]

As a result, there is no reason to suppose that the *Bedingfield* court took care to protect the interests of petitioners in the manner suggested in *Hansberry.* Nor is there any reason to suppose that the individual taxpayers in *Bedingfield* understood their suit to be on behalf of absent county taxpayers. Thus, to contend that the plaintiffs in *Bedingfield* somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be "to attribute to them a power that it cannot be said that they had assumed to exercise." *Hansberry,* 311 U. S., at 46.

Because petitioners and the *Bedingfield* litigants are best described as mere "strangers" to one another, *Martin* v. *Wilks,* 490 U. S., at 762, we are unable to conclude that the *Bedingfield* plaintiffs provided representation sufficient to make up for the fact that petitioners neither participated in, see *Montana* v. *United States,* 440 U. S. 147, 154 (1979), nor had the opportunity to participate in, the *Bedingfield* action. Accordingly, due process prevents the former from being bound by the latter's judgment.

IV

Respondents contend that, even if petitioners did not receive the kind of opportunity to make their case in court that due process would ordinarily ensure, the character of their action renders the usual constitutional protections inapplicable. They contend that invalidation of the occupation tax would have disastrous consequences on the county, which has made substantial commitments of tax revenues based on its understanding that *Bedingfield* determined the constitutionality of the tax. Respondents argue that in cases raising a public issue of this kind, the people may properly be regarded as the real party in interest and thus that petitioners received all the process they were due in the *Bedingfield* action.

---

[6] We need not decide here whether public officials are always constitutionally adequate representatives of all persons over whom they have jurisdiction when, as here, the underlying right is personal in nature. Cf. *Lockport* v. *Citizens for Community Action at Local Level, Inc.,* 430 U. S. 259, 263, n. 7 (1977) (voting rights challenge by county residents not barred by county's prior suit); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4458, p. 518 (1981); *infra,* at 803–805.

Our answer requires us to distinguish between two types of actions brought by taxpayers. In one category are cases in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds, see, *e. g.*, *Massachusetts* v. *Mellon*, 262 U. S. 447, 486–489 (1923), or about other public action that has only an indirect impact on his interests, *e. g.*, *Stromberg* v. *Board of Ed. of Bratenahl*, 64 Ohio St. 2d 98, 413 N. E. 2d 1184 (1980), *Tallassee* v. *State ex rel. Brunson*, 206 Ala. 169, 89 So. 514 (1921). As to this category of cases, we may assume that the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all.

Because the guarantee of due process is not a mere form, however, there obviously exists another category of taxpayer cases in which the State may not deprive individual litigants of their own day in court. By virtue of presenting a federal constitutional challenge to a State's attempt to levy personal funds, petitioners clearly bring an action of this latter type. Cf. *ibid.* (distinguishing between "public" and "private" actions). Indeed, we have previously struck down as a violation of due process a state court's decision denying an individual taxpayer any practicable opportunity to contest a tax on federal constitutional grounds. See *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673 (1930). There, we explained:

> "We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final . . . . Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. . . . [W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.*, at 681–682.

In any event, the Alabama Supreme Court did not hold here that petitioners' suit was of a kind that, under state law, could be brought only on behalf of the public at large. Cf. *Corprew* v. *Tallapoosa County*, 241 Ala. 492, 3 So. 2d 53 (1941) (discussing state statutory quo warranto proceedings). To conclude that the suit may nevertheless be barred by the prior action in *Bedingfield* would thus be to deprive petitioners of their "chose in action," which we have held to be a protected property interest in its own right. See *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 429–430 (1982); *Phillips Petroleum Co.* v. *Shutts*, 472 U. S., at 812 (relying on *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950)); *Hansberry* v. *Lee*, 311 U. S., at 37. Thus, we are not persuaded that the nature of petitioners' action permits us to deviate from the traditional rule that an extreme application of state-law res judicata principles violates the Federal Constitution.

Of course, we are aware that governmental and private entities have substantial interests in the prompt and determinative resolution of challenges to important legislation. We do not agree with the Alabama Supreme Court, however, that, given the amount of money at stake, respondents were entitled to rely on the assumption that the *Bedingfield* action "authoritatively establish[ed]" the constitutionality of the tax. 662 So. 2d, at 1130. A state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party. That general rule clearly applies when a taxpayer seeks a hearing to prevent the State from subjecting him to a levy in violation of the Federal Constitution.

V

Because petitioners received neither notice of, nor sufficient representation in, the *Bedingfield* litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging an allegedly unconstitutional deprivation of their property. Accordingly, the judgment of the Alabama Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

WHREN ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95–5841. Argued April 17, 1996—Decided June 10, 1996

Plainclothes policemen patrolling a "high drug area" in an unmarked vehicle observed a truck driven by petitioner Brown waiting at a stop sign at an intersection for an unusually long time; the truck then turned suddenly, without signaling, and sped off at an "unreasonable" speed. The officers stopped the vehicle, assertedly to warn the driver about traffic violations, and upon approaching the truck observed plastic bags of crack cocaine in petitioner Whren's hands. Petitioners were arrested. Prior to trial on federal drug charges, they moved for suppression of the evidence, arguing that the stop had not been justified by either a reasonable suspicion or probable cause to believe petitioners were engaged in illegal drug-dealing activity, and that the officers' traffic-violation ground for approaching the truck was pretextual. The motion to suppress was denied, petitioners were convicted, and the Court of Appeals affirmed.

Held: The temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective. Pp. 809–819.

(a) Detention of a motorist is reasonable where probable cause exists to believe that a traffic violation has occurred. See, *e. g., Delaware* v. *Prouse,* 440 U. S. 648, 659. Petitioners claim that, because the police may be tempted to use commonly occurring traffic violations as means of investigating violations of other laws, the Fourth Amendment test for traffic stops should be whether a reasonable officer would have stopped the car for the purpose of enforcing the traffic violation at issue. However, this Court's cases foreclose the argument that ulterior motives can invalidate police conduct justified on the basis of probable cause. See, *e. g., United States* v. *Robinson,* 414 U. S. 218, 221, n. 1, 236. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis. Pp. 809–813.

(b) Although framed as an empirical question—whether the officer's conduct deviated materially from standard police practices—petitioners' proposed test is plainly designed to combat the perceived danger of pretextual stops. It is thus inconsistent with this Court's cases, which make clear that the Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the subjective intent. See, *e. g., Robinson, supra,* at 236. Nor can the Fourth Amendment's protections be thought to vary from place to place and from time to time, which would be the consequence of assessing the reasonableness of police conduct in light of local law enforcement practices. Pp. 813–816.

(c) Also rejected is petitioners' argument that the balancing of interests inherent in Fourth Amendment inquiries does not support enforcement of minor traffic laws by plainclothes police in unmarked vehicles, since that practice only minimally advances the government's interest in traffic safety while subjecting motorists to inconvenience, confusion, and anxiety. Where probable cause exists, this Court has found it necessary to engage in balancing only in cases involving searches or seizures conducted in a manner unusually harmful to the individual. See, *e. g., Tennessee* v. *Garner,* 471 U. S. 1. The making of a traffic stop out of uniform does not remotely qualify as such an extreme practice. Pp. 816–819.

53 F. 3d 371, affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

Lisa Burget Wright argued the cause for petitioners. With her on the briefs were *A. J. Kramer, Neil H. Jaffee,* and *G. Allen Dale.*

James A. Feldman argued the cause for the United States. On the brief were *Solicitor General Days, Acting Assistant Attorney General Keeney, Deputy Solicitor General Dreeben,* and *Paul A. Engelmayer.**

---

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Steven R. Shapiro* and *Susan N. Herman;* and for the National Association of Criminal Defense Lawyers by *Natman Schaye* and *Walter B. Nash III.*

Briefs of *amici curiae* urging affirmance were filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* and for the State of California et al. by *Daniel E. Lungren,* Attorney General of California, *George Williamson,* Chief Assistant Attorney General, *Ronald A. Bass,* Senior Assistant Attorney General, *Joan Killeen* and *Catherine A. Rivlin,* Supervising Deputy Attorneys General, and *Christina V. Kuo,* Deputy Attorney General; and by the Attorneys General for their respective States as follows: *M. Jane Brady* of Delaware, JUSTICE SCALIA delivered the opinion of the Court.

In this case we decide whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.

I

On the evening of June 10, 1993, plainclothes vice-squad officers of the District of Columbia Metropolitan Police Department were patrolling a "high drug area" of the city in an unmarked car. Their suspicions were aroused when they passed a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right. The truck remained stopped at the intersection for what seemed an unusually long time—more than 20 seconds. When the police car executed a U-turn in order to head back toward the truck, the Pathfinder turned suddenly to its right, without signaling, and sped off at an "unreasonable" speed. The policemen followed, and in a short while overtook the Pathfinder when it stopped behind other traffic at a red light. They pulled up alongside, and Officer Ephraim Soto stepped out and approached the driver's door, identifying himself as a police officer and directing the driver, petitioner Brown, to put the vehicle in park. When Soto drew up to the driver's

---

Thomas J. Miller of Iowa, *Carla J. Stovall* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Mike Moore* of Mississippi, *Frankie Sue Del Papa* of Nevada, *Deborah T. Poritz* of New Jersey, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Charles W. Burson* of Tennessee, and *Jan Graham* of Utah.

Richard S. Michaels and *Jeff Rubin* filed a brief for the California District Attorney's Association as *amicus curiae*.

window, he immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren's hands. Petitioners were arrested, and quantities of several types of illegal drugs were retrieved from the vehicle.

Petitioners were charged in a four-count indictment with violating various federal drug laws, including 21 U. S. C. §§ 844(a) and 860(a). At a pretrial suppression hearing, they challenged the legality of the stop and the resulting seizure of the drugs. They argued that the stop had not been justified by probable cause to believe, or even reasonable suspicion, that petitioners were engaged in illegal drug-dealing activity; and that Officer Soto's asserted ground for approaching the vehicle—to give the driver a warning concerning traffic violations—was pretextual. The District Court denied the suppression motion, concluding that "the facts of the stop were not controverted," and "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop." App. 5.

Petitioners were convicted of the counts at issue here. The Court of Appeals affirmed the convictions, holding with respect to the suppression issue that, "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation." 53 F. 3d 371, 374–375 (CADC 1995). We granted certiorari. 516 U. S. 1036 (1996).

II

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of this provision. See *Delaware* v. *Prouse,* 440 U. S. 648, 653 (1979); *United States* v. *Martinez-Fuerte,* 428 U. S. 543, 556 (1976); *United States* v. *Brignoni-Ponce,* 422 U. S. 873, 878 (1975). An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. See *Prouse, supra,* at 659; *Pennsylvania* v. *Mimms,* 434 U. S. 106, 109 (1977) *(per curiam).*

Petitioners accept that Officer Soto had probable cause to believe that various provisions of the District of Columbia traffic code had been violated. See 18 D. C. Mun. Regs. §§ 2213.4 (1995) ("An operator shall . . . give full time and attention to the operation of the vehicle"); 2204.3 ("No person shall turn any vehicle . . . without giving an appropriate signal"); 2200.3 ("No person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions"). They argue, however, that "in the unique context of civil traffic regulations" probable cause is not enough. Since, they contend, the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. Petitioners, who are both black, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants. To avoid this danger, they say, the Fourth Amendment test for traffic stops should be, not the normal one (applied by the Court of Appeals) of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.

A

Petitioners contend that the standard they propose is consistent with our past cases' disapproval of police attempts to use valid bases of action against citizens as pretexts for pursuing other investigatory agendas. We are reminded that in *Florida* v. *Wells*, 495 U. S. 1, 4 (1990), we stated that "an inventory search[1] must not be a ruse for a general rummaging in order to discover incriminating evidence"; that in *Colorado* v. *Bertine*, 479 U. S. 367, 372 (1987), in approving an inventory search, we apparently thought it significant that there had been "no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation"; and that in *New York* v. *Burger*, 482 U. S. 691, 716–717, n. 27 (1987), we observed, in upholding the constitutionality of a warrantless administrative inspection,[2] that the search did not appear to be "a 'pretext' for obtaining evidence of . . . violation of . . . penal laws." But only an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred. In each case we were addressing the validity of a search conducted in the *absence* of probable cause. Our quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes. See *Bertine, supra,* at 371–372; *Burger, supra,* at 702–703.

---

[1] An inventory search is the search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items (such as might be kept in a towed car), and to protect against false claims of loss or damage. See *South Dakota* v. *Opperman*, 428 U. S. 364, 369 (1976).

[2] An administrative inspection is the inspection of business premises conducted by authorities responsible for enforcing a pervasive regulatory scheme—for example, unannounced inspection of a mine for compliance with health and safety standards. See *Donovan* v. *Dewey*, 452 U. S. 594, 599–605 (1981).

Petitioners also rely upon *Colorado* v. *Bannister,* 449 U. S. 1 (1980) *(per curiam),* a case which, like this one, involved a traffic stop as the prelude to a plain-view sighting and arrest on charges wholly unrelated to the basis for the stop. Petitioners point to our statement that "[t]here was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants" of the car. *Id.,* at 4, n. 4. That dictum *at most* demonstrates that the Court in *Bannister* found no need to inquire into the question now under discussion; not that it was certain of the answer. And it may demonstrate even less than that: If by "pretext" the Court meant that the officer really had not seen the car speeding, the statement would mean only that there was no reason to doubt probable cause for the traffic stop.

It would, moreover, be anomalous, to say the least, to treat a statement in a footnote in the *per curiam Bannister* opinion as indicating a reversal of our prior law. Petitioners' difficulty is not simply a lack of affirmative support for their position. Not only have we never held, outside the context of inventory search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary. In *United States* v. *Villamonte-Marquez,* 462 U. S. 579, 584, n. 3 (1983), we held that an otherwise valid warrantless boarding of a vessel by customs officials was not rendered invalid "because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana." We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification. In *United States* v. *Robinson,* 414 U. S. 218 (1973), we held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was "a mere pretext for a narcotics search," *id.*, at 221, n. 1; and that a lawful post-arrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches, see *id.*, at 236. See also *Gustafson* v. *Florida*, 414 U. S. 260, 266 (1973). And in *Scott* v. *United States*, 436 U. S. 128, 138 (1978), in rejecting the contention that wiretap evidence was subject to exclusion because the agents conducting the tap had failed to make any effort to comply with the statutory requirement that unauthorized acquisitions be minimized, we said that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." We described *Robinson* as having established that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." 436 U. S., at 136, 138.

We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

B

Recognizing that we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers, petitioners disavow any intention to make the individual officer's subjective good faith the touchstone of "reasonableness." They insist that the standard they have put forward—whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given—is an "objective" one. But although framed in empirical terms, this approach is plainly and indisputably driven by subjective considerations. Its whole purpose is to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons. Petitioners' proposed standard may not use the word "pretext," but it is designed to combat nothing other than the perceived "danger" of the pretextual stop, albeit only indirectly and over the run of cases. Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.

Why one would frame a test designed to combat pretext in such fashion that the court cannot take into account *actual and admitted pretext* is a curiosity that can only be explained by the fact that our cases have foreclosed the more sensible option. If those cases were based only upon the evidentiary difficulty of establishing subjective intent, petitioners' attempt to root out subjective vices through objective means might make sense. But they were not based only upon that, or indeed even principally upon that. Their principal basis—which applies equally to attempts to reach subjective intent through ostensibly objective means—is simply that the Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the subjective intent. See, *e. g.*, *Robinson, supra*, at 236 ("Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that [the arrestee] was armed") (footnotes omitted); *Gustafson, supra*, at 266 (same). But even if our concern had been only an evidentiary one, petitioners' proposal would by no means assuage it. Indeed, it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a "reasonable officer" would have been moved to act upon the traffic violation. While police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity.

Moreover, police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable, cf. *Gustafson, supra,* at 265; *United States* v. *Caceres,* 440 U. S. 741, 755–756 (1979), and can be made to turn upon such trivialities. The difficulty is illustrated by petitioners' arguments in this case. Their claim that a reasonable officer would not have made this stop is based largely on District of Columbia police regulations which permit plainclothes officers in unmarked vehicles to enforce traffic laws "only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others." Metropolitan Police Department, Washington, D. C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(4) (Apr. 30, 1992), reprinted as Addendum to Brief for Petitioners. This basis of invalidation would not apply in jurisdictions that had a different practice. And it would not have applied even in the District of Columbia, if Officer Soto had been wearing a uniform or patrolling in a marked police cruiser.

Petitioners argue that our cases support insistence upon police adherence to standard practices as an objective means of rooting out pretext. They cite no holding to that effect, and dicta in only two cases. In *Abel* v. *United States,* 362 U. S. 217 (1960), the petitioner had been arrested by the Immigration and Naturalization Service (INS), on the basis of an administrative warrant that, he claimed, had been issued on pretextual grounds in order to enable the Federal Bureau of Investigation (FBI) to search his room after his arrest. We regarded this as an allegation of "serious misconduct," but rejected Abel's claims on the ground that "[a] finding of bad faith is . . . not open to us on th[e] record" in light of the findings below, including the finding that " 'the proceedings taken by the [INS] differed in no respect from what would have been done in the case of an individual concerning whom [there was no pending FBI investigation],' " *id.*, at 226–227. But it is a long leap from the proposition that following regular procedures is some evidence of lack of pretext to the proposition that failure to follow regular procedures *proves* (or is an operational substitute for) pretext. *Abel,* moreover, did not involve the assertion that pretext could invalidate a search or seizure for which there was probable cause—and even what it said about pretext in other contexts is plainly inconsistent with the views we later stated in *Robinson, Gustafson, Scott,* and *Villamonte-Marquez.* In the other case claimed to contain supportive dicta, *United States* v. *Robinson,* 414 U. S. 218 (1973), in approving a search incident to an arrest for driving without a license, we noted that the arrest was "not a departure from established police department practice." *Id.*, at 221, n. 1. That was followed, however, by the statement that "[w]e leave for another day questions which would arise on facts different from these." *Ibid.* This is not even a dictum that purports to provide an answer, but merely one that leaves the question open.

III

In what would appear to be an elaboration on the "reasonable officer" test, petitioners argue that the balancing inherent in any Fourth Amendment inquiry requires us to weigh the governmental and individual interests implicated in a traffic stop such as we have here. That balancing, petitioners claim, does not support investigation of minor traffic infractions by plainclothes police in unmarked vehicles; such investigation only minimally advances the government's interest in traffic safety, and may indeed retard it by producing motorist confusion and alarm—a view said to be supported by the Metropolitan Police Department's own regulations generally prohibiting this practice. And as for the Fourth Amendment interests of the individuals concerned, petitioners point out that our cases acknowledge that even ordinary traffic stops entail "a possibly unsettling show of authority"; that they at best "interfere with freedom of movement, are inconvenient, and consume time" and at worst "may create substantial anxiety," *Prouse*, 440 U. S., at 657. That anxiety is likely to be even more pronounced when the stop is conducted by plainclothes officers in unmarked cars.

It is of course true that in principle every Fourth Amendment case, since it turns upon a "reasonableness" determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause. That is why petitioners must rely upon cases like *Prouse* to provide examples of actual "balancing" analysis. There, the police action in question was a random traffic stop for the purpose of checking a motorist's license and vehicle registration, a practice that—like the practices at issue in the inventory search and administrative inspection cases upon which petitioners rely in making their "pretext" claim—involves police intrusion *without the probable cause that is its traditional justification.* Our opinion in *Prouse* expressly distinguished the case from a stop based on precisely what is at issue here: "probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations." *Id.*, at 661. It noted approvingly that "[t]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations," *id.*, at 659, which afford the " 'quantum of individualized suspicion' " necessary to ensure that police discretion is sufficiently constrained, *id.*, at 654–655 (quoting *United States* v. *Martinez-Fuerte,* 428 U. S., at 560). What is true of *Prouse* is also true of other cases that engaged in detailed "balancing" to decide the constitutionality of automobile stops, such as *Martinez-Fuerte,* which upheld checkpoint stops, see 428 U. S., at 556–562, and *Brignoni-Ponce,* which disallowed so-called "roving patrol" stops, see 422 U. S., at 882–884: The detailed "balancing" analysis was necessary because they involved seizures without probable cause.

Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, see *Tennessee* v. *Garner,* 471 U. S. 1 (1985), unannounced entry into a home, see *Wilson* v. *Arkansas,* 514 U. S. 927 (1995), entry into a home without a warrant, see *Welsh* v. *Wisconsin,* 466 U. S. 740 (1984), or physical penetration of the body, see *Winston* v. *Lee,* 470 U. S. 753 (1985). The making of a traffic stop out of uniform does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken "outbalances" private interest in avoiding police contact.

Petitioners urge as an extraordinary factor in this case that the "multitude of applicable traffic and equipment regulations" is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop. But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.

For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.

* * *

Here the District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct. The judgment is

Affirmed.

DEGEN *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95–173. Argued April 22, 1996—Decided June 10, 1996

Petitioner Degen is outside the United States and cannot be extradited to face federal drug charges. When he filed an answer in a related civil action, contesting the Government's attempt to forfeit properties allegedly purchased with proceeds from his drug dealings, the District Court struck his claims and entered summary judgment against him, holding that he was not entitled to be heard in the forfeiture action because he remained outside the country, unamenable to criminal prosecution. The court's final order vested title to the properties in the United States, and the Court of Appeals affirmed.

Held: A district court may not strike a claimant's filings in a forfeiture suit and grant summary judgment against him for failing to appear in a related criminal prosecution. Pp. 822–829.

(a) The Government contends that the District Court's inherent powers authorized it to strike Degen's claims under what has been labeled the "fugitive disentitlement doctrine." Principles of deference counsel restraint in resorting to the courts' inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities, see, *e. g., Chambers* v. *NASCO, Inc.,* 501 U. S. 32, 44, and require its use to be a reasonable response to the problems and needs provoking it, *Ortega-Rodriguez* v. *United States,* 507 U. S. 234, 244. Pp. 822–824.

(b) No necessity justifies disentitlement here. Since the court's jurisdiction over the property is secure despite Degen's absence, there is no risk of delay or frustration in determining the merits of the Government's forfeiture claims or in enforcing the resulting judgment. The court has alternatives, other than the harsh sanction of disentitlement, to keep Degen from using liberal civil discovery rules to gain an improper advantage in the criminal prosecution, where discovery is more limited. Disentitlement also is too arbitrary a means of redressing the indignity visited upon the court by Degen's absence from the criminal proceedings and deterring flight from criminal prosecution by Degen and others. A court's dignity derives from the respect accorded its judgments. That respect is eroded, not enhanced, by excessive recourse to rules foreclosing consideration of claims on the merits. Pp. 824–829.

47 F. 3d 1511, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

Lawrence S. Robbins argued the cause for petitioner. With him on the briefs were *Andrew L. Frey, Alan E. Untereiner,* and *Daniel W. Stewart.*

Miguel A. Estrada argued the cause for the United States. With him on the brief were *Solicitor General Days, Acting Assistant Attorney General Keeney,* and *Deputy Solicitor General Dreeben.**

JUSTICE KENNEDY delivered the opinion of the Court.

In this case we consider whether a United States District Court may strike the filings of a claimant in a forfeiture suit and grant summary judgment against him for failing to appear in a related criminal prosecution. The Court of Appeals for the Ninth Circuit held this to be a proper exercise of the District Court's inherent authority. We reverse.

A federal grand jury in Nevada indicted Brian Degen for distributing marijuana, laundering money, and related crimes. On the same day in 1989 that it unsealed the indictment, the United States District Court for the District of Nevada also unsealed a civil forfeiture complaint. The Government sought to forfeit properties in California, Nevada, and Hawaii, allegedly worth $5.5 million and purchased with proceeds of Degen's drug sales or used to facilitate the sales. 84 Stat. 1276, as amended, 21 U. S. C. §§881(a)(6)–(a)(7). An affidavit by an agent of the Drug Enforcement Agency accompanied the complaint and recounted instances of Degen's alleged drug smuggling during the previous 20 years.

---

*Briefs of *amici curiae* urging reversal were filed for Public Citizen by *Alan B. Morrison* and *Allison M. Zieve;* and for Ghaith R. Pharaon by *Richard F. Lawler.*

Degen is a citizen of the United States and of Switzerland, his father having been born there. Degen moved to Switzerland with his family in 1988. He has not returned to face the criminal charges against him, and we are advised that Switzerland's extradition treaty with the United States does not oblige either country to turn its nationals over to the other. While remaining outside this country, however, Degen did file an answer in the civil action to contest the forfeiture. Among other things, he contended the Government's claims were barred by the statute of limitations, 46 Stat. 758, as amended, 19 U. S. C. § 1621, and based on an unlawful retroactive application of the forfeiture laws.

The District Court in the forfeiture case did not consider any of these arguments. Instead it granted the Government's motion to strike Degen's claims and entered summary judgment against him. The court held Degen was not entitled to be heard in the civil forfeiture action because he remained outside the country, unamenable to criminal prosecution. *United States* v. *Real Property Located at Incline Village*, 755 F. Supp. 308 (1990). After another two years consumed by procedural matters (for the most part involving attempts by Degen's wife to contest the forfeiture), the District Court entered a final order vesting title to the properties in the United States. The Court of Appeals for the Ninth Circuit affirmed. *United States* v. *Real Property Located at Incline Village*, 47 F. 3d 1511 (1995). We granted certiorari. 516 U. S. 1070 (1996).

In an ordinary case a citizen has a right to a hearing to contest the forfeiture of his property, a right secured by the Due Process Clause, *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 48–62 (1993); *Fuentes* v. *Shevin*, 407 U. S. 67, 80 (1972); *McVeigh* v. *United States*, 11 Wall. 259, 266–267 (1871), and implemented by federal rule, Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims. Nonetheless, the Government argues, the

District Court's inherent powers authorized it to strike Degen's claims under what some courts have labeled the "fugitive disentitlement doctrine." We have sustained, to be sure, the authority of an appellate court to dismiss an appeal or writ in a criminal matter when the party seeking relief becomes a fugitive. *Ortega-Rodriguez* v. *United States,* 507 U. S. 234, 239 (1993); *Smith* v. *United States,* 94 U. S. 97 (1876). The question before us is whether the doctrine should be extended to allow a court in a civil forfeiture suit to enter judgment against a claimant because he is a fugitive from, or otherwise is resisting, a related criminal prosecution. The Courts of Appeals to consider the question have come to different conclusions (compare the decision here and in *United States* v. *Eng,* 951 F. 2d 461 (CA2 1991), with *United States* v. *$40,877.59 in United States Currency,* 32 F. 3d 1151 (CA7 1994), and *United States* v. *$83,320 in United States Currency,* 682 F. 2d 573 (CA6 1982)), precipitating our grant of certiorari in this case.

Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities. *Chambers* v. *NASCO, Inc.,* 501 U. S. 32, 43–46 (1991); *Link* v. *Wabash R. Co.,* 370 U. S. 626, 630–631 (1962); *United States* v. *Hudson,* 7 Cranch 32, 34 (1812). The extent of these powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority. *Roadway Express, Inc.* v. *Piper,* 447 U. S. 752, 764 (1980). In many instances the inherent powers of the courts may be controlled or overridden by statute or rule. *Carlisle* v. *United States, ante,* at 426; *Bank of Nova Scotia* v. *United States,* 487 U. S. 250, 254 (1988). Principles of deference counsel restraint in resorting to inherent power, *Chambers* v. *NASCO, supra,* at 44, and require its use to be a reasonable response to the problems and needs that provoke it, *Ortega-Rodriguez* v. *United States, supra,* at 244; *Thomas* v. *Arn,* 474 U. S. 140, 146–148 (1985).

In accord with these principles, we have held federal courts do have authority to dismiss an appeal or writ of certiorari if the party seeking relief is a fugitive while the matter is pending. Several reasons have been given for the rule. First, so long as the party cannot be found, the judgment on review may be impossible to enforce. This was the rationale of the first case to acknowledge the doctrine, *Smith* v. *United States, supra,* at 97: "It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render." See also *Bohanan* v. *Nebraska,* 125 U. S. 692 (1887); *Eisler* v. *United States,* 338 U. S. 189 (1949). Second, we have said an appellant's escape "disentitles" him "to call upon the resources of the Court for determination of his claims." *Molinaro* v. *New Jersey,* 396 U. S. 365, 366 (1970) *(per curiam).* The cases cited so far involved the dismissal of fugitives' petitions in this Court. In reviewing similar practices in state courts for conformity with the Due Process Clause, we have noted further reasons for them: Disentitlement "discourages the felony of escape and encourages voluntary surrenders," and "promotes the efficient, dignified operation" of the courts. *Estelle* v. *Dorrough,* 420 U. S. 534, 537 (1975) *(per curiam)* (using those reasons to justify refusing to reinstate an appeal even once an escaped appellant is recaptured). See also *Allen* v. *Georgia,* 166 U. S. 138 (1897).

Against this backdrop came our decision four Terms ago in *Ortega-Rodriguez.* The defendant had escaped from federal custody after conviction but before sentencing. He was sentenced *in absentia,* but later was recaptured and resentenced; he then filed an appeal, which was dismissed on the authority of *Smith* v. *United States, supra,* and the other disentitlement cases just described. We reversed, holding those precedents did not justify dismissal of an appeal by a fugitive recaptured before the appeal was filed. We noted the judgment of the Court of Appeals would be enforceable against the appellant, and that his earlier absence, when no appeal was pending, did not threaten the dignity of the court imposing the sanction. *Ortega-Rodriguez* v. *United States,* 507 U. S., at 244–246. We did not rule out the possibility of appellate disentitlement where necessary to prevent actual prejudice to the Government from a fugitive's extended absence, *id.*, at 249, but we concluded the sanction of disentitlement was unjustified as a sanction applicable to all cases where an escape once had occurred, *id.*, at 249–251. We conduct a similar examination of the disentitlement imposed here, and find it likewise unjustified.

There is no risk in this case of delay or frustration in determining the merits of the Government's forfeiture claims or in enforcing the resulting judgment. The Government has shown probable cause to forfeit the property, and Degen must refute the showing or suffer its loss. Since the court's jurisdiction over the property is secure despite Degen's absence, there is no danger the court in the forfeiture suit will waste its time rendering a judgment unenforceable in practice.

The Government is on stronger ground in suggesting the criminal prosecution against Degen might be compromised by his participation in the forfeiture case. The problem stems from the differences between the discovery privileges available to Degen in each case. See *Afro-Lecon, Inc.* v. *United States,* 820 F. 2d 1198, 1203–1204 (CA Fed. 1987); *Campbell* v. *Eastland,* 307 F. 2d 478, 487 (CA5 1962). A criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified. Fed. Rules Crim. Proc. 16(a)(2), 26.2. In a civil case, by contrast, a party is entitled as a general matter to discovery of any information sought if it appears "reasonably calculated to lead to the discovery of admissible evidence." Fed. Rule Civ. Proc. 26(b)(1). The Government contends Degen might use the rules of civil discovery in the forfeiture suit to gain an improper advantage in the criminal matter, prying into the prosecution's case in a manner not otherwise permitted.

These problems are not uncommon when criminal and civil forfeiture suits are pending at the same time, but they are made acute by Degen's absence. If he were in federal custody, the risk of compromising the criminal case could be avoided by staying the civil suit until the prosecution is over. 21 U. S. C. § 881(i). Cf. *United States* v. *Kordel*, 397 U. S. 1, 9 (1970). Degen rendered this solution impractical by frustrating the prosecution of the criminal case against him. The criminal trial cannot begin until he returns, *Crosby* v. *United States*, 506 U. S. 255 (1993); if the civil matter were subordinated to the criminal, the forfeiture could be held in abeyance for an indefinite time. This delay would be prejudicial to the Government, for if its forfeiture claims are good, its right to the properties is immediate. We nonetheless are satisfied the District Court has the means to resolve these dilemmas without resorting to a rule forbidding all participation by the absent claimant.

First, the District Court has its usual authority to manage discovery in a civil suit, including the power to enter protective orders limiting discovery as the interests of justice require. Fed. Rule Civ. Proc. 26(c). Decisions in the Courts of Appeals have sustained protective orders to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases. See, *e. g., In re Ramu Corp.*, 903 F. 2d 312, 316–317, 320–321 (CA5 1990); *United States* v. *Stewart*, 872 F. 2d 957, 962–963 (CA10 1989); *Campbell* v. *Eastland, supra*, at 487. See also *Capital Engineering & Mfg. Co., Inc.* v. *Weinberger*, 695 F. Supp. 36, 41–42 (DC 1988); *Founding Church of Scientology* v. *Kelley*, 77 F. R. D. 378, 380–381 (DC 1977).

Second, the court can exercise its discretion to manage the civil litigation to avoid interference with the criminal case. If, for instance, the Government were unable to rebut Degen's arguments except by revealing confidential details of the criminal investigation, the court could consider controlling or limiting the form of proof, or in an extreme case even the theories it permits the absent party to pursue, to prevent him from exploiting the asymmetries he creates by participating in one suit but not the other.

Third, of course, Degen's absence entitles him to no advantage. If his unwillingness to appear in person results in noncompliance with a legitimate order of the court respecting pleading, discovery, the presentation of evidence, or other matters, he will be exposed to the same sanctions as any other uncooperative party. A federal court has at its disposal an array of means to enforce its orders, including dismissal in an appropriate case. Again, its powers include those furnished by federal rule, see, *e. g.*, Fed. Rules Civ. Proc. 37, 41(b); *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U. S. 639 (1976) *(per curiam); Societe Internationale pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U. S. 197, 212 (1958); cf. *United States* v. *Pole No. 3172*, 852 F. 2d 636, 641–642 (CA1 1988), and by inherent authority, see, *e. g.*, *Chambers* v. *NASCO, Inc.*, 501 U. S., at 44–45; *Link* v. *Wabash R. Co.*, 370 U. S., at 630–633; *Woodson* v. *Surgitek, Inc.*, 57 F. 3d 1406, 1416–1417 (CA5 1995); *Zebrowski* v. *Hanna*, 973 F. 2d 1001, 1006 (CA1 1992) (Breyer, C. J.).

The details of these steps are committed to the discretion of the District Court; it would be premature to consider now the precise measures the court should adopt as the case proceeds. The existence of these alternative means of protecting the Government's interests, however, shows the lack of necessity for the harsh sanction of absolute disentitlement. Consideration of some of Degen's defenses, such as the statute of limitations, appears to require little discovery. If they have merit, the Government should not prevail; if they are groundless, the Government's interests will not be compromised by their consideration.

We have yet to consider two other purposes said to be advanced by disentitlement: The need to redress the indignity visited upon the District Court by Degen's absence from the criminal proceeding, and the need to deter flight from criminal prosecution by Degen and others. Both interests are substantial, but disentitlement is too blunt an instrument for advancing them. Without resolving whether Degen is a fugitive in all the senses of the word debated by the parties, we acknowledge disquiet at the spectacle of a criminal defendant reposing in Switzerland, beyond the reach of our criminal courts, while at the same time mailing papers to the court in a related civil action and expecting them to be honored. Cf. *United States* v. *Sharpe,* 470 U. S. 675, 681–682, n. 2 (1985). A court-made rule striking Degen's claims and entering summary judgment against him as a sanction, however, would be an arbitrary response to the conduct it is supposed to redress or discourage.

The right of a citizen to defend his property against attack in a court is corollary to the plaintiff's right to sue there. *McVeigh* v. *United States,* 11 Wall., at 267. For this reason we have held it unconstitutional to use disentitlement similar to this as punishment for rebellion against the United States, *ibid.*, or, in at least one instance, for contempt of court, *Hovey* v. *Elliott,* 167 U. S. 409, 413–414 (1897). We need not, and do not, intimate a view on whether enforcement of a disentitlement rule under proper authority would violate due process, cf. *Blackmer* v. *United States,* 284 U. S. 421 (1932). It remains the case, however, that the sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits.

There would be a measure of rough justice in saying Degen must take the bitter with the sweet, and participate in the District Court either for all purposes or none. But the justice would be too rough. A court's inherent power is limited by the necessity giving rise to its exercise. There was no necessity to justify the rule of disentitlement in this case; to strike Degen's filings and grant judgment against him would be an excessive response to the concerns here advanced.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

EXXON CO., U. S. A., ET AL. *v.* SOFEC, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95–129. Argued March 19, 1996—Decided June 10, 1996

Petitioner Exxon's oil tanker, the *Exxon Houston*, ran aground and was lost several hours after its "breakout" from a mooring facility owned and operated, or manufactured, by the various respondents. Exxon filed a complaint in admiralty against respondents, alleging, *inter alia*, negligence and breach of warranty. In granting respondents' motion to bifurcate the trial, the District Court limited the first phase thereof to the question whether the postbreakout conduct of the *Houston's* captain, Captain Coyne, was the superseding and sole proximate cause of the loss of the ship, leaving the issue of causation of the breakout itself for the second phase. After a bench trial, the court found that Captain Coyne's (and by imputation, Exxon's) extraordinary negligence was indeed the superseding and sole proximate cause of the *Houston's* grounding, and entered final judgment against Exxon. The Ninth Circuit affirmed. Among other things, it rejected Exxon's legal argument that the doctrines of proximate causation and superseding cause are no longer applicable in admiralty in light of *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, in which this Court abandoned the "divided damages" rule previously applied in admiralty and adopted the comparative fault principle for allocating damages among responsible parties; held that the District Court's causation findings were well supported by the record and not clearly erroneous; ruled that the lower court did not err in rendering judgment against Exxon on its breach of warranty claims; and concluded that, under the circumstances, the bifurcation of the trial was not an abuse of discretion.

Held: A plaintiff in admiralty that is the superseding, and thus the sole proximate, cause of its own injury cannot recover part of its damages from tortfeasors or contracting partners whose blameworthy actions or breaches were causes in fact of the plaintiff's injury. Pp. 836–842.

(a) The Court rejects Exxon's primary argument that the proximate causation requirement, and the related superseding cause doctrine, are not or should not be applicable in admiralty. The Court finds unpersuasive Exxon's assertion that the lower courts' refusal to allocate any share of damages to parties whose fault was a cause in fact of its injury conflicts with *Reliable Transfer*. The proximate causation requirement was not before the Court in that case, and the Court did not suggest that it was inapplicable in admiralty. There is nothing internally inconsistent in a system that apportions damages based upon comparative fault only among tortfeasors whose actions were proximate causes of an injury. Nor is there any repugnancy between the superseding cause doctrine, which is one facet of the proximate causation requirement, and a comparative fault method of allocating damages. Exxon may be correct that common-law proximate cause concepts are complex and sometimes confusing, but those concepts are generally thought to be a necessary limitation on liability. In ruling upon whether a defendant's blameworthy act was sufficiently related to the resulting harm to warrant imposing liability for that harm on the defendant, admiralty courts may draw guidance from, *inter alia*, the extensive body of state law applying proximate causation requirements and from treatises and other scholarly sources. Pp. 836–839.

(b) Exxon's argument that the District Court erred in rendering judgment against it on its breach of warranty claims fares no better. Exxon errs in relying upon *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315, which does not purport to deal with the proximate causation limitation for damages on such claims and is not relevant here. Where the injured party is the sole proximate cause of the damage complained of, that party cannot recover in contract from a party whose breach of warranty is found to be a mere cause in fact of the damage. Although the principles of legal causation sometimes receive labels in contract analysis different from the "proximate causation" label most frequently employed in tort analysis, these principles nevertheless also restrict liability in contract. The finding that Captain Coyne's extraordinary negligence was the sole proximate cause of Exxon's injury suffices to cut off respondents' liability for that injury on a contractual breach of warranty theory as well. Pp. 839–840.

(c) Also rejected is Exxon's argument that the lower courts' findings that Captain Coyne's extraordinary negligence was the sole proximate cause of Exxon's injury were in error. Although Exxon identifies some tension in the courts' various findings, it has not made the sort of "obvious and exceptional showing of error," *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275, that would justify this Court's reversal of the lower courts' ultimate conclusion. Pp. 840–841.

(d) Exxon's argument that bifurcation of the trial was error is not within the questions upon which this Court granted certiorari. To the extent that the argument reprises the issue whether the fault of all parties must be considered together in order that they may be compared under *Reliable Transfer*, it is rejected. To the extent that Exxon argues that the District Court abused its discretion in dividing the trial in the particular way that it did, the Court declines to address the argument. Pp. 841–842.

54 F. 3d 570, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court.

Shirley M. Hufstedler argued the cause and filed briefs for petitioners.

George Playdon argued the cause for respondents. With him on the brief for respondents Pacific Resources, Inc., et al. were *James W. McCartney, Theodore G. Dimitry, Eugene J. Silva,* and *Richard H. Page. Kenneth W. Starr, Edward W. Warren, Richard A. Cordray, Randall K. Schmitt, David W. Proudfoot,* and *John R. Lacy* filed a brief for respondents Sofec, Inc., et al.*

JUSTICE THOMAS delivered the opinion of the Court.

In *United States* v. *Reliable Transfer Co.,* 421 U. S. 397 (1975), we abandoned the "divided damages" rule previously applied to claims in admiralty for property damages, and adopted the comparative fault principle for allocating damages among parties responsible for an injury. In this case we affirm that the requirement of legal or "proximate" causation, and the related "superseding cause" doctrine, apply in admiralty notwithstanding our adoption of the comparative fault principle.

I

This case arises from the stranding of a tanker, the *Exxon Houston,* several hours after it broke away from a Single Point Mooring System (SPM) owned and operated by the HIRI respondents and manufactured by respondent Sofec, Inc.[1] The *Houston* was engaged in delivering oil into HIRI's pipeline through two floating hoses, pursuant to a contract between Exxon and respondent PRII, when a heavy storm broke the chafe chain linking the vessel to the SPM. As the vessel drifted, the oil hoses broke away from the SPM. The parting of the second hose at approximately 1728 nautical time was designated below as the "breakout." The hoses were bolted to the ship, and a portion of the second hose remained attached to the ship. So long as the hose was attached to and trailing from the ship, it threatened to foul the ship's propeller, and consequently the ship's ability to maneuver was restricted.

**Thomas J. Wagner* and *Chester D. Hooper* filed a brief for the Maritime Law Association of the United States as *amicus curiae.*

[1] The *Houston* was owned and operated by petitioner Exxon Shipping Company, whose vessels carried crude oil for petitioner Exxon Company, U. S. A. We will refer to both of these companies as Exxon. The HIRI

During the 2 hours and 41 minutes following the breakout, the captain of the *Houston*, Captain Coyne, took the ship through a series of maneuvers described in some detail in the District Court's findings of fact. The District Court found that by 1803, a small assist vessel, the *Nene*, was able to get control of the end of the hose so that it was no longer a threat to the *Houston*. See 54 F. 3d 570, 572 (CA9 1995). Between 1803 and 1830, Captain Coyne maneuvered the *Houston* out to sea and away from shallow water. The District Court, and on appeal, a panel of the Court of Appeals for the Ninth Circuit, found that by 1830, the *Houston* had successfully avoided the peril resulting from the breakout. App. to Pet. for Cert. 65; 54 F. 3d, at 578–579. The ship had "reached a safe position," App. to Pet. for Cert. 64, and was "heading out to sea and in no further danger of stranding," *id.*, at 65; 54 F. 3d, at 578.

Many of Captain Coyne's actions after 1830 were negligent, according to the courts below. Most significant was his failure to have someone plot the ship's position between 1830 and 2004, a period during which the crews of the *Houston* and the *Nene* were working to disconnect the hose from the *Houston*. Without knowing his position, Captain Coyne

---

respondents are several affiliated corporations: Pacific Resources, Inc.; Hawaiian Independent Refinery, Inc.; PRI Marine, Inc.; and PRI International, Inc. (PRII).

was unable to make effective use of a navigational chart to check for hazards. The courts found that this failure to plot fixes of the ship's position was grossly and extraordinarily negligent. App. to Pet. for Cert. 61; 54 F. 3d, at 578. The District Court found that "Captain Coyne's decisions were made calmly, deliberately and without the pressure of an imminent peril." App. to Pet. for Cert. 60. His failure to plot fixes after 1830 "was entirely independent of the fact of breakout; he voluntarily decided not to plot fixes in a situation where he was able to plot fixes." *Id.*, at 64.

At 1956, Captain Coyne initiated a final turn toward the shore. Because he had not plotted the ship's position, Captain Coyne was unaware of its position until he ordered another crew member to plot the fix at 2004. Upon seeing the fix on the chart, the captain apparently realized that the ship was headed for a reef. Captain Coyne's ensuing efforts to avoid the reef came too late, and moments later the ship ran aground, resulting in its constructive total loss. The District Court found that Captain Coyne's decision to make this final turn "was not foreseeable." *Id.*, at 65.

Exxon filed a complaint in admiralty against the HIRI respondents and respondent Sofec for, *inter alia*, the loss of its ship and cargo. The complaint contained claims for breach of warranty, strict products liability, and negligence. HIRI filed a complaint against several third-party respondents, who had manufactured and supplied the chafe chain that held the tanker to the SPM.

Before trial, respondents suggested that Captain Coyne's conduct was the superseding and sole proximate cause of the loss of the ship, and they moved to bifurcate the trial. Respondents and the third-party respondents disputed among themselves the cause of the breakout, and they apparently sought bifurcation of the trial to avoid lengthy proceedings to resolve those factual disputes prior to a determination whether Captain Coyne's conduct was the superseding cause of Exxon's injury. The District Court granted the motion, limiting the first phase of the trial to the issue of proximate causation with respect to actions taken after the breakout, and leaving the issue of causation of the breakout itself for the second phase.

Following a 3-week bench trial in admiralty, the District Court found that Captain Coyne's (and by imputation, Exxon's) extraordinary negligence was the superseding and sole proximate cause of the *Houston's* grounding. *Id.*, at 63. The court entered final judgment against Exxon with respect to the loss of the *Houston*, and Exxon appealed.

The Ninth Circuit held that the District Court's findings "that Captain Coyne had ample time, as well as opportunity and available manpower, to take precautions which would have eliminated the risk of grounding, and that his failure to do so amounted to extraordinary negligence, superseding any negligence of the defendants with regard to the breakout or provision of safe berth after the breakout," were "well supported by the record," and not clearly erroneous. 54 F. 3d, at 579. The court rejected Exxon's contention that the captain's actions were foreseeable reactions to the breakout; rather, it noted, Captain Coyne himself had explained that he did not plot fixes "because he felt it was unnecessary to do so." *Id.*, at 578.

Relying upon Circuit precedent, the court rejected Exxon's legal argument that the doctrines of proximate causation and superseding cause were no longer applicable in admiralty in light of this Court's decision in *Reliable Transfer*. "[A]n intervening force supersedes prior negligence" and thus breaks the chain of proximate causation required to impose liability on the original actor, the court held, "where the subsequent actor's negligence was 'extraordinary' (defined as 'neither normal nor reasonably foreseeable')." 54 F. 3d, at 574. The court also rejected Exxon's argument that the District Court erred in rendering judgment against Exxon on its breach of warranty claims. "Where, as here, the district court finds the injured party to be the superseding or *sole* proximate cause of the damage complained of, it cannot recover from a party whose actions or omissions are deemed to be causes in fact, but not legal causes of the damage." *Id.*, at 576. Finally, the court held that under the circumstances of the case, the District Court's bifurcation of the trial was not an abuse of discretion. We granted certiorari. 516 U. S. 983 (1995).

II

Exxon makes four arguments for the reversal of the judgment below: (1) that the superseding cause doctrine does not or should not apply in admiralty; (2) that respondents' breaches of warranty were causes in fact of the loss of the *Houston* and hence respondents should be liable for that loss; (3) that the lower courts' finding that Captain Coyne's extraordinary negligence was the sole proximate cause of the loss of the *Houston* was in error; and (4) that the District Court abused its discretion and deprived Exxon of due process in bifurcating the issue of proximate causation from the other issues.

A

Exxon's primary argument is that the proximate causation requirement, and the related superseding cause doctrine, are not or should not be applicable in admiralty. In particular, Exxon asserts that the lower courts' refusal to allocate any share of damages to parties whose fault was a cause in fact of Exxon's injury conflicts with our decision in *Reliable Transfer.*

We disagree. In *Reliable Transfer,* we discarded a longstanding rule that property damages in admiralty cases are to be divided equally between those liable for injury, "whatever the relative degree of their fault may have been," 421 U. S., at 397, and adopted the comparative fault principle in its stead.[2] The proximate causation requirement was not before us in *Reliable Transfer*, and we did not suggest that the requirement was inapplicable in admiralty. (Nor, for that matter, did we consider whether the injury had been proximately caused by the defendant in that case.)

There is nothing internally inconsistent in a system that apportions damages based upon comparative fault only among tortfeasors whose actions were proximate causes of an injury. Nor is there any repugnancy between the superseding cause doctrine, which is one facet of the proximate causation requirement, and a comparative fault method of allocating damages. As Professor Schoenbaum has said:

> "The doctrine of superseding cause is . . . applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable. It is properly applied in admiralty cases.
>
> ". . . [T]he superseding cause doctrine can be reconciled with comparative negligence. Superseding cause operates to cut off the liability of an admittedly negligent defendant, and there is properly no apportionment of comparative fault where there is an absence of proxi-

---

[2] Some commentators have suggested that there may be a distinction between a system allocating damages on the basis of comparative culpability, and a system allocating damages on the basis of both comparative culpability and the degree to which fault proximately or foreseeably contributed to an injury. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts 474 (5th ed. 1984) (hereinafter Keeton); 1 T. Schoenbaum, Admiralty and Maritime Law § 5–4, p. 167 (2d ed. 1994); Owen & Whitman, Fifteen Years Under *Reliable Transfer:* 1975–1990, Developments in American Maritime Law in Light of the Rule of Comparative Fault, 22 J. Mar. L. & Com. 445, 476–483 (1991). We continue to use the term "comparative fault" employed in *Reliable Transfer*, but we do not mean thereby to take a position on which of these systems is the appropriate one, assuming that there is in fact a distinction between them.

> mate causation." 1 T. Schoenbaum, Admiralty and Maritime Law § 5–3, pp. 165–166 (2d ed. 1994).

Indeed, the HIRI respondents assert that of the 46 States that have adopted a comparative fault system, at least 44 continue to recognize and apply the superseding cause doctrine. Brief for HIRI Respondents 28, and n. 31; *id.*, at App. A (listing state-court decisions). Exxon does not take issue with this assertion and concedes that it is not aware of any state decision that holds otherwise. Tr. of Oral Arg. 10.

Exxon also argues that we should in any event eschew in the admiralty context the "confusing maze of common-law proximate cause concepts"; a system in which damages are allocated based upon the degree of comparative fault of any party whose act was a cause in fact of injury is "fairer and simpler," it says. Reply Brief for Petitioners 2. It is true that commentators have often lamented the degree of disagreement regarding the principles of proximate causation and confusion in the doctrine's application, see, *e. g.*, Keeton 263, but it is also true that proximate causation principles are generally thought to be a necessary limitation on liability, see, *e. g.*, *id.*, at 264, 293, 294, 312. Indeed, the system Exxon apparently proposes either would let proximate causation principles, with all of their complexity, creep back in as one factor in the "comparative fault" analysis itself, see n. 2, *supra*, or would produce extreme results. "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." Keeton 264. Nevertheless,

> "the careless actor will [not] always be held for all damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity. Thus, if the [negligent] destruction of the Michigan Avenue Bridge had delayed the arrival of a doctor, with con-

> sequent loss of a patient's life, few judges would impose liability." *Petition of Kinsman Transit Co.*, 338 F. 2d 708, 725 (CA2 1964), quoted in 1 Schoenbaum, *supra*, § 5–3, at 164.

In ruling upon whether a defendant's blameworthy act was sufficiently related to the resulting harm to warrant imposing liability for that harm on the defendant, courts sitting in admiralty may draw guidance from, *inter alia*, the extensive body of state law applying proximate causation requirements and from treatises and other scholarly sources. See Keeton 279 ("'The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other'") (quoting 1 T. Street, Foundations of Legal Liability 110 (1906)).

B

Exxon's argument that the District Court erred in rendering judgment against Exxon on its breach of warranty claims fares no better. Exxon implicitly argues that because the respondents breached various contractual warranties, they were "best situated" to prevent the loss of the *Houston;* and Exxon invokes a passage from *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964). In *Italia Societa*, we held that a stevedore breaches its implied warranty of workmanlike service to a shipowner when the stevedore nonnegligently supplies defective equipment that injures one of its employees during stevedoring operations. That case does not purport to deal with the proximate causation limitation for damages on a warranty claim and is not relevant to the question presented here.

We agree with the Ninth Circuit that where the injured party is the sole proximate cause of the damage complained of, that party cannot recover in contract from a party whose breach of warranty is found to be a mere cause in fact of the damage. Although the principles of legal causation sometimes receive labels in contract analysis different from the "proximate causation" label most frequently employed in tort analysis, these principles nevertheless exist to restrict liability in contract as well. Indeed, the requirement of foreseeability may be more stringent in the context of contract liability than it is in the context of tort liability. See *East River S. S. Corp.* v. *Transamerica Delaval Inc.*, 476 U. S. 858, 874–875 (1986); Restatement (Second) of Contracts § 351 and Comment *a*, pp. 135–136 (1979); 11 W. Jaeger, Williston on Contracts § 1344, pp. 227–228 (3d ed. 1968); 5 A. Corbin, Corbin on Contracts § 1008, pp. 75–76 (1964); *id.*, § 1019, at 113–116; cf. 3 E. Farnsworth, Contracts § 12.14, pp. 241–243 (1990) (*Hadley* v. *Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), "impose[s] a more severe limitation on the recovery of damages for breach of contract than that applicable to actions in tort or for breach of warranty, in which substantial or proximate cause is the test"). The finding that Captain Coyne's extraordinary negligence was the sole proximate cause of Exxon's injury suffices to cut off respondents' liability for that injury on a contractual breach of warranty theory as well.

C

The legal question that we took this case to address is whether a plaintiff in admiralty that is the superseding and thus the sole proximate cause of its own injury can recover part of its damages from tortfeasors or contracting partners whose blameworthy actions or breaches were causes in fact of the plaintiff's injury. As we have held above, the answer is that it may not. Apparently anticipating that this legal issue would not likely be resolved in its favor, Exxon devotes a large portion of its briefs to arguing that the findings by the lower courts that Captain Coyne's extraordinary negligence was the sole proximate cause of Exxon's injury were in error. The issues of proximate causation and superseding cause involve application of law to fact, which is left to the factfinder, subject to limited review. See, *e. g.*, *Milwaukee & St. Paul R. Co.* v. *Kellogg*, 94 U. S. 469, 473–476 (1877); Keeton 320–321; 5 Corbin, *supra*, § 998, at 22–23. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949); see also *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 665 (1987); *Reliable Transfer*, 421 U. S., at 401, n. 2. Although Exxon identifies some tension in the various findings made by the courts below,[3] we nevertheless conclude that Exxon has not made an "obvious and exceptional showing of error" that would justify our reversal of the courts' ultimate conclusion, reached after a 3-week trial and review of a lengthy and complex record. Without necessarily ratifying the application of proximate causation principles by the courts below to the particular facts here, we decline to reconsider their conclusion.

D

Finally, Exxon argues that the District Court erred in bifurcating the trial. This issue is not within the questions upon which we granted certiorari. See Pet. for Cert. i. To the extent that Exxon argues that the issue involved here—whether one cause of injury is a superseding cause—can never be bifurcated from other issues, we reject that contention. Again, Exxon relies upon *Reliable Transfer* in asserting that the fault of all parties must be considered together in order that they may be compared. As explained above, that argument is wrong: A party whose fault did not proximately cause the injury is not liable at all. To the extent that Exxon argues that the District Court abused its discretion in dividing the trial in the particular way that it did here, we decline to address that argument.

---

[3] Exxon argues that the courts' findings—that by 1803, the *Nene* had gained control of the end of the hose so that it was no longer a threat to the *Houston*, and that by 1830, the *Houston* had successfully avoided the peril resulting from alleged breaches of duty on respondents' part, had "reached a safe position," and was "heading out to sea and in no further danger of stranding"—are inconsistent with the apparently uncontested finding that the hose, which was suspended from the ship's crane during efforts to disconnect the hose from the ship, caused the crane to topple at 1944, injuring a crewman. We note in this regard that the District Court expressly found that the captain's failure to plot fixes after 1830 "was entirely independent of the fact of breakout" and that "he voluntarily decided not to plot fixes in a situation where he was able to plot fixes," App. to Pet. for Cert. 64; the Court of Appeals also relied upon the fact that Captain Coyne himself had explained that he did not plot fixes "because he felt it was unnecessary to do so," 54 F. 3d 570, 578 (CA9 1995).

The judgment is affirmed.

It is so ordered.

UNITED STATES *v.* INTERNATIONAL BUSINESS MACHINES CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 95–591. Argued March 18, 1996—Decided June 10, 1996

Pursuant to § 4371 of the Internal Revenue Code, respondent International Business Machines Corporation (IBM) paid a tax on insurance premiums remitted to foreign insurers to cover shipments of goods to its foreign subsidiaries. When its refund claims were denied, IBM filed suit in the Court of Federal Claims, contending that § 4371's application to policies insuring export shipments violated the Export Clause, which states that "[n]o Tax or Duty shall be laid on Articles exported from any State." The court agreed, rejecting the Government's argument that *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U. S. 19—in which this Court held that a federal stamp tax on policies insuring marine risks could not, under the Export Clause, be constitutionally applied to policies covering export shipments—had been superseded by subsequent decisions interpreting the Import-Export Clause, which states in relevant part, "No State shall . . . lay any Imposts or Duties on Imports or Exports." The Court of Appeals affirmed.

Held: The Export Clause prohibits assessment of nondiscriminatory federal taxes on goods in export transit. Pp. 846–863.

(a) While this Court has strictly enforced the Export Clause's prohibition against federal taxation of goods in export transit and certain closely related services and activities, see, *e. g., Thames & Mersey, supra,* it has not exempted pre-export goods and services from ordinary tax burdens or exempted from federal taxation various services and activities only tangentially related to the export process, see, *e. g., Cornell* v. *Coyne,* 192 U. S. 418. Conceding that the tax assessed here violates the Export Clause under *Thames & Mersey,* the Government asks that the case be overruled because its underlying theory has been rejected in the context of the Commerce and Import-Export Clauses and those Clauses have historically been interpreted in harmony with the Export Clause. Pp. 846–850.

(b) When this Court expressly disavowed its early view that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274, 288–289, it resolved a long struggle over the meaning of the nontextual negative command of that Clause. The Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports. These textual disparities strongly suggest that shifts in the Court's view of the dormant Commerce Clause's scope cannot govern Export Clause interpretation. Cf. *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U. S. 69, 75–76. Pp. 850–853.

(c) While one may question *Thames & Mersey*'s finding that a tax on policies insuring exports is functionally the same as a tax on exportation itself, the Government apparently has chosen not to do so here. Under the principles that animate the policy of *stare decisis*, the Court declines to overrule *Thames & Mersey*'s longstanding precedent, which has caused no uncertainty in commercial export transactions, on a theory not argued by the parties. Pp. 854–856.

(d) This Court's recent Import-Export Clause cases do not require that *Thames & Mersey* be overruled. Meaningful textual differences that should not be overlooked exist between the Export Clause and the Import-Export Clause. In finding the assessments in *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, and *Department of Revenue of Wash.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734, valid, the Court recognized that the Import-Export Clause's absolute ban on "Imposts or Duties" is not a ban on every tax. Because impost and duty are thus narrower terms than tax, a particular state assessment might be beyond the Import-Export Clause's reach, while an identical federal assessment might be subject to the Export Clause. The word "Tax" has a common, and usually expansive, meaning that should not be ignored. The Clauses were also intended to serve different goals. The Government's policy argument—that the Framers intended the Export Clause to narrowly alleviate the fear of northern repression through taxation of southern exports by prohibiting only discriminatory taxes—cannot be squared with the Clause's broad language. The better reading is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all. See *Fairbank* v. *United States*, 181 U. S. 283. Pp. 857–861.

(e) Even assuming that *Michelin* and *Washington Stevedoring* govern the Export Clause inquiry here, those holdings do not interpret the Import-Export Clause to permit assessment of nondiscriminatory taxes on imports and exports in transit. Pp. 861–862.

59 F. 3d 1234, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 863. STEVENS, J., took no part in the consideration or decision of the case.

Jeffrey P. Minear argued the cause for the United States. On the briefs were *Solicitor General Days, Assistant Attorney General Argrett, Deputy Solicitor General Wallace, Kent L. Jones, Gary R. Allen,* and *Ernest J. Brown.*

James R. Atwood argued the cause for respondent. With him on the brief was *Andrew W. Singer.*

JUSTICE THOMAS delivered the opinion of the Court.

We resolve in this case whether the Export Clause of the Constitution permits the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit. We hold that it does not.

I

Section 4371 of the Internal Revenue Code imposes a tax on insurance premiums paid to foreign insurers that are not subject to the federal income tax.[1] 26 U. S. C. § 4371 (1982 ed.). International Business Machines Corporation (IBM) ships products that it manufactures in the United States to numerous foreign subsidiaries and insures those shipments against loss. When the foreign subsidiary makes the shipping arrangements, the subsidiary often places the insurance with a foreign carrier. When it does, both IBM and the subsidiary are listed as beneficiaries in the policy.

IBM filed federal excise tax returns for the years 1975 through 1984, but reported no liability under § 4371. The Internal Revenue Service (IRS) audited IBM and determined that the premiums paid to foreign insurers were taxable under § 4371 and that IBM—as a named beneficiary of the insurance policies—was liable for the tax. The IRS assessed a tax against IBM for each of those years.

IBM paid the assessments and filed refund claims, which the IRS denied. IBM then commenced suit in the Court of

---

[1] The tax does not apply if a policy issued by a foreign insurer is "signed or countersigned by an officer or agent of the insurer in a State, or in the District of Columbia, within which such insurer is authorized to do business." 26 U. S. C. § 4373(1) (1982 ed.).

Federal Claims, contending that application of § 4371 to policies insuring its export shipments violated the Export Clause. The focus of the suit was this Court's decision in *Thames & Mersey Marine Ins. Co.* v. *United States,* 237 U. S. 19 (1915), in which we held that a federal stamp tax on policies insuring marine risks could not, under the Export Clause, be constitutionally applied to policies covering export shipments. The United States argued that the analysis of *Thames & Mersey* is no longer valid, having been superseded by subsequent decisions interpreting the Import-Export Clause—specifically, *Michelin Tire Corp.* v. *Wages,* 423 U. S. 276 (1976), and *Department of Revenue of Wash.* v. *Association of Wash. Stevedoring Cos.,* 435 U. S. 734 (1978). The Court of Federal Claims noted that this Court has never overruled *Thames & Mersey* and ruled that application of § 4371 to policies insuring goods in export transit violates the Export Clause. 31 Fed. Cl. 500 (1994). The Court of Appeals for the Federal Circuit affirmed. 59 F. 3d 1234 (1995). We agreed to hear this case to decide whether we should overrule *Thames & Mersey.* 516 U. S. 1021 (1995).

II

The Export Clause states simply and directly: "No Tax or Duty shall be laid on Articles exported from any State." U. S. Const., Art. I, § 9, cl. 5. We have had few occasions to interpret the language of the Export Clause, but our cases have broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process. At the same time, we have attempted to limit the term "Articles exported" to permit federal taxation of pre-export goods and services.

Our early cases upheld federal assessments on the manufacture of particular products ultimately intended for export by finding that pre-export products are not "Articles exported." See *Pace* v. *Burgess,* 92 U. S. 372 (1876); *Turpin* v. *Burgess,* 117 U. S. 504 (1886); *Cornell* v. *Coyne,* 192 U. S. 418

(1904). *Pace* and *Turpin* both involved a federal excise tax on tobacco products. In *Pace,* though tobacco intended for export was exempted from the tax, the exemption itself was subject to a per-package stamp charge of 25 cents. When a tobacco manufacturer challenged the stamp charge, we upheld the charge on the basis that the stamps were designed to prevent fraud in the export exemption from the excise tax and did not, therefore, represent a tax on exports. 92 U. S., at 375. When Congress later repealed the 25-cent charge for the exemption stamp in a statute that referred to the stamp as an "export tax," another manufacturer sued to recover the money it had paid for the exemption stamps. See *Turpin, supra.* Without disturbing the prior ruling in *Pace* that the stamp charge was not a tax on exports, 117 U. S., at 505, we explained that the prohibition of the Export Clause "has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported," *id.,* at 507. We said that the plaintiffs would have had no Export Clause claim even if there had been no exemption from the excise because the goods were not in the course of exportation and might never be exported. *Ibid. Turpin* broadly suggested that the Export Clause prohibits both taxes levied on goods in the course of exportation and taxes directed specifically at exports.

In *Cornell,* the Court addressed whether the Export Clause prohibited application of a federal excise tax on filled cheese manufactured under contract for export. Looking to the analysis set out in *Turpin,* we rejected the contention that the Export Clause bars application of a nondiscriminatory tax imposed before the product entered the course of exportation. "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." *Cornell, supra,* at 427. *Pace, Turpin,* and *Cornell* made clear that nondiscriminatory pre-exportation assessments do not violate the Export Clause, even if the goods are eventually exported.

At the same time we were defining a domain within which nondiscriminatory taxes could permissibly be imposed on goods intended for export, we were also making clear that the Export Clause strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation. See *Fairbank* v. *United States,* 181 U. S. 283 (1901); *United States* v. *Hvoslef,* 237 U. S. 1 (1915); *Thames & Mersey Marine Ins. Co.* v. *United States, supra.* In *Fairbank,* for example, we addressed a federal stamp tax on bills of lading for export shipments imposed by the War Revenue Act of 1898. The Court found that the tax was facially discriminatory, 181 U. S., at 290, and, though not directly imposed on the goods being exported, the tax was nevertheless "in effect a duty on the article transported," *id.,* at 294. Consequently, the tax fell directly into the category of forbidden taxes on exports defined in *Turpin.* In striking down the tax, we said:

> "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.' Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress . . . ." 181 U. S., at 290.

Hvoslef and *Thames & Mersey* differed from *Fairbank* in that the taxes imposed in those cases—on ship charters and marine insurance, respectively—did not facially discriminate against exports. The Court nonetheless prohibited the application of those generally applicable, nondiscriminatory taxes to the transactions at issue because each tax was, in effect, a tax on exports. The type of charter contract at issue in *Hvoslef* was "in contemplation of law a mere contract of affreightment," 237 U. S., at 16, and we found that the tax, as applied to charters for exportation, "was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports," *id.*, at 17. Likewise, in *Thames & Mersey,* we found that "proper insurance during the voyage is one of the necessities of exportation" and that "the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves." 237 U. S., at 27.

Shortly after *Hvoslef* and *Thames & Mersey,* the Court rejected an attempt to shield from taxation the net income of a company engaged in the export business. *William E. Peck & Co.* v. *Lowe,* 247 U. S. 165 (1918). In accordance with the analysis set out in *Turpin,* we found both that the tax was nondiscriminatory and that "[i]t is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes." 247 U. S., at 174.

Only a few years later the Court struck down the application of a tax on the export sale of certain baseball equipment. See *A. G. Spalding & Bros.* v. *Edwards,* 262 U. S. 66 (1923). Although the tax was clearly nondiscriminatory, we explained that the goods being taxed had entered the course of exportation when they were delivered to the export carrier. *Id.*, at 70. Because the taxable event, the transfer of title, occurred at the same moment the goods entered the course of exportation, we held that the tax could not constitutionally be applied to the export sale. *Id.*, at 69–70.

The Court has strictly enforced the Export Clause's prohibition against federal taxation of goods in export transit, and we have extended that protection to certain services and activities closely related to the export process. We have not, however, exempted pre-export goods and services from ordinary tax burdens; nor have we exempted from federal taxation various services and activities only tangentially related to the export process.

III

The Government concedes, as it did below, that this case is largely indistinguishable from *Thames & Mersey* and that, if *Thames & Mersey* is still good law, the tax assessed against IBM under § 4371 violates the Export Clause. See Tr. of Oral Arg. 5; 59 F. 3d, at 1237. The parties apparently agree that there is no legally significant distinction between the insurance policies at issue in this case and those at issue in *Thames & Mersey*, and, accordingly, the Government asks that we overrule *Thames & Mersey.*

The Government asserts that the Export Clause permits the imposition of generally applicable, nondiscriminatory taxes, even on goods in export transit. The Government urges that we have historically interpreted the Commerce, Import-Export, and Export Clauses in harmony and that we have rejected the theory underlying *Thames & Mersey* in the context of the Commerce and Import-Export Clauses. Accordingly, the Government contends that our Export Clause jurisprudence, symbolized by *Thames & Mersey*, has become an anachronism in need of modernization. The Government asks us to reinterpret the Export Clause to permit the imposition of generally applicable, nondiscriminatory taxes as we have under the Commerce Clause and, it argues, under the Import-Export Clause.

A

The Government contends that our dormant Commerce Clause jurisprudence has shifted dramatically and that our traditional understanding of the Export Clause, which is based partly on an outmoded view of the Commerce Clause, can no longer be justified. It is true that some of our early Export Clause cases relied on an interpretation of the

Commerce Clause that we have since rejected. In *Fairbank,* 181 U. S., at 298–300, for example, we analogized to *Robbins* v. *Shelby County Taxing Dist.,* 120 U. S. 489, 497 (1887), in which we held that "[i]nterstate commerce cannot be taxed at all [by the States], even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." Referring to the categorical ban on taxation of interstate commerce declared in *Robbins,* we likened the scope of the Commerce Clause's ban on state taxation of interstate commerce to the Export Clause's ban on federal taxation of exports. *Fairbank, supra,* at 300; see also *Hvoslef,* 237 U. S., at 15 ("The court [in *Fairbank*] found an analogy in the construction which had been given to the commerce clause in protecting interstate commerce from state legislation imposing direct burdens"). After *Thames & Mersey,* the Commerce Clause construction espoused in *Robbins* fell out of favor, see *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 254 (1938) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business"), and we expressly disavowed that view in *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274, 288–289 (1977).

Our rejection in *Complete Auto* of much of our early dormant Commerce Clause jurisprudence did not, however, signal a similar rejection of our Export Clause cases. Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid. At one time, the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view.[2]

---

[2] The Commerce Clause is an express grant of power to Congress to "regulate Commerce . . . among the several States." U. S. Const., Art. I, §8, cl. 3. It does not expressly prohibit the States from doing anything,

The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports. These textual disparities strongly suggest that shifts in the Court's view of the scope of the dormant Commerce Clause should not, and indeed cannot, govern our interpretation of the Export Clause. Cf. *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U. S. 69, 75–76 (1946) (distinguishing accommodations made under the Commerce Clause from the express textual prohibition of the Import-Export Clause).

B

The Government's primary assertion is that modifications in our Import-Export Clause jurisprudence require parallel modifications in the Export Clause context. More specifically, the Government argues that our decisions in *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976), and *Department of Revenue of Wash.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734 (1978), establish that States may impose generally applicable, nondiscriminatory taxes even if those taxes fall on imports or exports. The Export Clause, the Government contends, is no more restrictive.

The Import-Export Clause, which is textually similar to the Export Clause, says in relevant part, "No State shall . . . lay any Imposts or Duties on Imports or Exports." U. S. Const., Art. I, § 10, cl. 2. Though minor textual differences exist and the Clauses are directed at different sovereigns, historically both have been treated as broad bans on taxation of exports, and in several cases the Court has interpreted the provisions of the two Clauses in tandem. For instance, in the Court's first decision interpreting the Import-Export Clause, Chief Justice Marshall said:

---

though we have long recognized negative implications of the Clause that prevent certain state taxation even when Congress has failed to legislate. See *Fulton Corp.* v. *Faulkner*, 516 U. S. 325, 330–331 (1996); *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 309 (1992).

> "The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited." *Brown* v. *Maryland,* 12 Wheat. 419, 445 (1827).

See also *Kosydar* v. *National Cash Register Co.,* 417 U. S. 62, 67, n. 5 (1974); *Hvoslef, supra,* at 13–14; *Cornell,* 192 U. S., at 427–428; *Turpin,* 117 U. S., at 506–507. The Government argues that our longstanding parallel interpretations of the two Clauses require judgment in its favor. We disagree.

In *Michelin,* we addressed whether a State could impose a nondiscriminatory ad valorem property tax on imported goods that were no longer in import transit. Michelin, which imported tires from Canada and France and stored them in a warehouse, argued that Georgia could not constitutionally assess ad valorem property taxes against its imported tires. We explained that "[t]he Framers of the Constitution . . . sought to alleviate three main concerns": (i) ensuring that the Federal Government speaks with one voice when regulating foreign commerce; (ii) preserving import revenues as a major source of federal revenue; and (iii) preventing disharmony likely to be caused if seaboard States taxed goods coming through their ports. *Michelin, supra,* at 285–286. The Court found that nondiscriminatory ad valorem taxes violate none of these policies. A century earlier, however, the Court had ruled that, under the "original package doctrine," a State could not impose such a tax until the goods had lost their character as imports and had been incorporated into the mass of property in the State. *Low* v. *Austin,* 13 Wall. 29, 34 (1872). The *Michelin* Court overruled *Low* and held that the nondiscriminatory property tax levied on Michelin's inventory of imported tires did not violate the Import-Export Clause because it was not an impost or duty on imports. 423 U. S., at 301. See also *Limbach* v. *Hooven & Allison Co.,* 466 U. S. 353 (1984) (reaffirming that

Michelin expressly overruled the original package doctrine altogether and not merely *Low* on its facts).

Two years later, in *Washington Stevedoring,* we upheld against an Import-Export Clause challenge a nondiscriminatory state tax assessed against the compensation received by stevedoring companies for services performed within the State. The Court found that Washington's stevedoring tax did not violate the policies underlying the Import-Export Clause. Unlike the property tax at issue in *Michelin,* the activity taxed by Washington occurred while imports and exports were in transit. That fact was not dispositive, however, because the tax did not fall on the goods themselves:

> "The levy reaches only the business of loading and unloading ships or, in other words, the business of transporting cargo within the State of Washington. Despite the existence of the first distinction, the presence of the second leads to the conclusion that the Washington tax is not a prohibited 'Impost or Duty' when it violates none of the policies [that animate the Import-Export Clause]." *Washington Stevedoring, supra,* at 755.

Relying on *Canton R. Co.* v. *Rogan,* 340 U. S. 511 (1951), which upheld a tax on the gross receipts of a railroad that operated a marine terminal and transported imports and exports, we ruled in *Washington Stevedoring* that taxation of transportation services, whether by railroad on the docks or by stevedores loading and unloading ships, did not relate to the value of the goods and could not be considered imposts or duties on the goods themselves. 435 U. S., at 757.

1

A tax on policies insuring exports is not, precisely speaking, the same as a tax on exports, but *Thames & Mersey* held that they were functionally the same under the Export Clause. We noted in *Washington Stevedoring* that one may question the finding in *Thames & Mersey* that the tax was essentially a tax upon the exportation itself. 435 U. S., at 756, n. 21. We expressed concern that "[t]he basis for distinguishing *Thames & Mersey* is less clear" than for *Fairbank* or *Richfield Oil*, because the marine insurance policies in *Thames & Mersey* arguably "had a value apart from the value of the goods." 435 U. S., at 756, n. 21. Nevertheless, the Government apparently has chosen not to challenge that aspect of *Thames & Mersey* in this case. Tr. of Oral Arg. 5, 8–9, 40. When questioned on that implicit concession at oral argument, the Government admitted that it "chose not to" argue that § 4371 does not impose a tax on the goods themselves. *Id.*, at 9. It would be inappropriate for us to reexamine in this case, without the benefit of the parties' briefing, whether the policies on which § 4371 is assessed are so closely connected to the goods that the tax is, in essence, a tax on exports.[3] See, *e. g., id.*, at 27–28 ("[T]he record doesn't reveal the sort of statistical information Justice Breyer was suggesting might be relevant" to determine "whether this is sufficiently indirect that it's not a tax on exports, . . . because the Government has conceded throughout that they are not disputing that this tax, if discriminatory, is in violation of the Constitution").

---

[3] The Court has never held that the Export Clause prohibits only direct taxation of goods in export transit. In *Brown* v. *Maryland*, 12 Wheat. 419 (1827), Chief Justice Marshall expressed in dicta his skepticism that a federal occupational tax on exporters could pass scrutiny under the Export Clause. *Id.*, at 445 ("[W]ould government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"). In *Fairbank, Hvoslef,* and *Thames & Mersey*, we struck down taxes that were not assessed directly on goods in export transit, but which the Court found to be so closely related as to be effectively a tax on the goods themselves. We have never repudiated that principle, but neither have we ever carefully defined how we decide whether a particular federal tax is sufficiently related to the goods or their value to violate the Export Clause. To the extent the issue was raised in the petition for certiorari, the Government failed to address the issue in its brief on the merits and therefore has abandoned it. See *Posters 'N' Things, Ltd.* v. *United States*, 511 U. S. 513, 527 (1994); *Russell* v. *United States*, 369 U. S. 749, 754, n. 7 (1962).

Stare decisis is a "principle of policy," *Helvering* v. *Hallock,* 309 U. S. 106, 119 (1940), and not "an inexorable command," *Payne* v. *Tennessee,* 501 U. S. 808, 828 (1991). Applying that policy, we frequently have declined to overrule cases in appropriate circumstances because *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.,* at 827. "[E]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Id.,* at 842 (SOUTER, J., concurring) (quoting *Arizona* v. *Rumsey,* 467 U. S. 203, 212 (1984)).

Though from time to time we have overruled governing decisions that are "unworkable or are badly reasoned," *Payne, supra,* at 827; see *Smith* v. *Allwright,* 321 U. S. 649, 665 (1944), we have rarely done so on grounds not advanced by the parties. *Thames & Mersey* has been controlling precedent for over 80 years, and the Government does not, indeed could not, argue that the rule established there is "unworkable." Despite the dissent's speculative protestations to the contrary, *post,* at 871–872, there is simply no evidence that *Thames & Mersey* has caused or will cause uncertainty in commercial export transactions. The principles that animate our policy of *stare decisis* caution against overruling a longstanding precedent on a theory not argued by the parties, and we decline to do so in this case.[4]

---

[4] The dissent suggests that "the Court assumes the statute to be invalid rather than deciding it to be so." *Post,* at 864. We make no such assumptions. Rather, we begin with a longstanding decision that, by all accounts, controls this case. Even the Government agrees that Congress enacted a law whose application in this case directly contravenes our hold-

2

What the Government does argue is that our Import-Export Clause cases require us to overrule *Thames & Mersey.*[5] We have good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence. Though we have frequently interpreted the Clauses together, see *supra,* at 852–854, our more recent Import-Export Clause cases, on which the Government relies, caution that meaningful textual differences exist and should not be overlooked. The Export Clause prohibits Congress from laying any "Tax or Duty" on exports, while the Import-Export Clause prevents the States from laying any "Imposts or Duties" on imports or exports. In both *Michelin* and *Washington Stevedoring,* we left open the possibility that a particular state assessment might not properly be called an impost or duty, and thus would be beyond the reach of the Import-Export Clause, while an identical federal assessment might properly be called a tax and would be subject to the Export Clause. Though we found in *Michelin* that a nondiscriminatory state property tax does not transgress the policy dictates of the Import-Export Clause, we also recognized that the Import-Export Clause is "not written in terms of a broad prohibition of every 'tax,' " and that impost and duty are narrower terms than tax. 423 U. S., at 290–293. In *Washington Stevedoring,* we likewise rejected the assertion that the Import-Export Clause absolutely prohibits all taxation of imports and exports. 435 U. S., at 759. We said that "the term 'Impost or Duty' is not self-defining and does not necessarily encompass all taxes" and that the respondents' argument to

---

ing in *Thames & Mersey.* We sit not to condemn § 4371, but rather to determine whether it is to be saved by overruling binding precedent.

[5] The dissent suggests that we make a "serious mistake" in deciding whether a nondiscriminatory tax on goods violates the Export Clause, *post,* at 881. We do not agree that it is a mistake to address the arguments actually advanced by the parties.

the contrary ignored "the central holding of *Michelin* that the absolute ban is only of 'Imposts or Duties' and not of all taxes." *Ibid.*

The distinction between imposts or duties and taxes is especially pertinent in light of the peculiar definitional analysis we chose in *Michelin.* Finding substantial ambiguity in the phrase "Imposts or Duties," we "decline[d] to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate." 423 U. S., at 293–294. We entirely bypassed the etymological inquiry into the proper meaning of the terms "impost" and "duty," and instead created a regime in which those terms are conclusions to be drawn from an examination into whether a particular assessment "was the type of exaction that was regarded as objectionable by the Framers of the Constitution." *Id.,* at 286. We are not prepared to say that the word "Tax" is "sufficiently ambiguous," *id.,* at 293, that we may ignore its common, and usually expansive,[6] meaning in favor of an Export Clause decisional rule in which a tax is not a "Tax" unless it discriminates against exports. Consequently, *Michelin* and *Washington Stevedoring,* which held that the assessments in question were not "Imposts or Duties" at all, do not logically validate the assessment at issue in this case, which, by all accounts, remains a "Tax."

It is not intuitively obvious that *Michelin*'s three-pronged analysis of the Framers' concerns is really just another way of stating a nondiscrimination principle. But even if it were, the Government cannot reasonably rely on *Michelin* to govern the Export Clause because *Michelin* drew its analysis around the phrase "Imposts or Duties" and expressly excluded the broader term "Tax" that appears in the Export Clause. *Michelin* marked a more permissive approach to state taxation under the Import-Export Clause only by distinguishing the presumptively stricter language of the Export Clause. We agree with the Government that *Michelin* informs our decision in this case, but not in a way that supports the Government's position. It is simply no longer true that the Court perceives no substantive difference between the two Clauses.

---

[6] Though *Michelin* discusses "taxes" in terms of "every exaction," 423 U. S., at 290, it also suggests that at the time of the founding "probably only capitation, land, and general property exactions were known by the term 'tax' rather than the term 'duty,'" *id.,* at 291. In any event, the *Michelin* Court understood that the terms used in the Export Clause were broader than those used in the Import-Export Clause.

We are similarly hesitant to adopt the Import-Export Clause's policy-based analysis without some indication that the Export Clause was intended to alleviate the same "evils" to which the Import-Export Clause was directed. Unlike the Import-Export Clause, which was intended to protect federal supremacy in international commerce, to preserve federal revenue from import duties and imposts, and to prevent coastal States with ports from taking unfair advantage of inland States, see *Michelin, supra,* at 285–286, the Export Clause serves none of those goals. Indeed, textually, the Export Clause does quite the opposite. It specifically prohibits Congress from regulating international commerce through export taxes, disallows any attempt to raise federal revenue from exports, and has no direct effect on the way the States treat imports and exports.

As a purely historical matter, the Export Clause was originally proposed by delegates to the Federal Convention from the Southern States, who feared that the Northern States would control Congress and would use taxes and duties on exports to raise a disproportionate share of federal revenues from the South. See 2 M. Farrand, The Records of the Federal Convention of 1787, pp. 95, 305–308, 359–363 (rev. ed. 1966). The Government argues that this "narrow historical purpose" justifies a narrow interpretation of the text and that application of §4371 to policies insuring exports does not conflict with the policies embodied in the Clause. Brief for United States 32–34. While the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language. See, *e. g.*, 2 Farrand, Records of the Federal Convention, *supra*, at 220 (Mr. King: "In two great points the hands of the Legislature were absolutely tied. The importation of slaves could not be prohibited—exports could not be taxed"); *id.*, at 305 ("Mr. Mason urged the necessity of connecting with the power of levying taxes . . . that no tax should be laid on exports"); *id.*, at 360 (Mr. Elseworth *[sic]:* "There are solid reasons agst. Congs taxing exports"); *ibid.* ("Mr. Butler was strenuously opposed to a power over exports"); *id.*, at 361 (Mr. Sherman: "It is best to prohibit the National legislature in all cases"); *id.*, at 362 ("Mr. Gerry was strenuously opposed to the power over exports").

The Government argued for a different narrow interpretation of the Export Clause in *Fairbank.* See 181 U. S., at 292–293. Arguing that the Debates expressed a primary interest in diffusing sectional conflicts, the Government urged the *Fairbank* Court to interpret the Export Clause to permit taxation of "the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country." *Id.*, at 292. We rejected that argument:

> "If mere discrimination between the States was all that was contemplated, it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export." *Ibid.*

As in *Fairbank,* we think the text of the constitutional provision provides a better decisional guide than that offered by the Government. The Government's policy argument—that the Framers intended the Export Clause to narrowly alleviate the fear of northern repression through taxation of southern exports by prohibiting only discriminatory taxes—cannot be squared with the broad language of the Clause. The better reading, that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all.

3

Even assuming that *Michelin* and *Washington Stevedoring* govern our Export Clause inquiry in this case, the Government's argument falls short of its goal. Our holdings in *Michelin* and *Washington Stevedoring* do not reach the facts of this case and, more importantly, do not interpret the Import-Export Clause to permit assessment of nondiscriminatory taxes on imports and exports in transit. *Michelin* involved a tax on goods, but the goods were no longer in transit. The tax in *Washington Stevedoring* burdened imports and exports while they were still in transit, but it did not fall directly on the goods themselves. This case, as it comes to us, is a hybrid in which the tax both burdens exports during transit and—as the Government concedes and our earlier cases held—is essentially a tax on the goods themselves. The Government argues that *Michelin* and *Washington Stevedoring* by analogy permit Congress to impose generally applicable, nondiscriminatory taxes that fall directly on exports in transit. Brief for United States 32 (*Michelin* and *Washington Stevedoring* "demonstrate that, when a generally applicable, nondiscriminatory tax is at issue, the mere fact that the tax applies also to goods that are in the export or import process does not provide a constitutional immunity from taxation"). If this contention is to succeed, the Government at the very least must show that our Import-Export Clause jurisprudence now permits a

State to impose a nondiscriminatory tax directly on goods in import or export transit. We think the Government has failed to make that showing.

The Court has never upheld a state tax assessed directly on goods in import or export transit. In *Michelin,* we suggested that the Import-Export Clause would invalidate application of a nondiscriminatory property tax to goods still in import or export transit. 423 U. S., at 290 (compliance with the Import-Export Clause may be secured "by prohibiting the assessment of even nondiscriminatory property taxes on [import or export] goods which are merely in transit through the State when the tax is assessed"). See also *Virginia Indonesia Co.* v. *Harris County Appraisal Dist.,* 910 S. W. 2d 905, 915 (Tex. 1995) (invalidating application of a nondiscriminatory ad valorem property tax to goods in export transit).

We also declined to endorse the Government's theory in *Washington Stevedoring.* After reciting that the Court in *Canton R. Co.* had distinguished *Thames & Mersey, Fairbank,* and *Richfield Oil,* we pointed out that in those cases "the State [or Federal Government] had taxed either the goods or activity so connected with the goods that the levy amounted to a tax on the goods themselves." *Washington Stevedoring,* 435 U. S., at 756, n. 21. We expressly declined to "reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit," *id.,* at 757, n. 23, because, although the goods in that case were in transit, the tax fell on "a service distinct from the goods and their value," *id.,* at 757. Thus, contrary to the Government's contention, this Court's Import-Export Clause cases have not upheld the validity of generally applicable, nondiscriminatory taxes that fall on imports or exports in transit. We think those cases leave us free to follow the express textual command of the Export Clause to prohibit the application of any tax "laid on Articles exported from any State."

* * *

We conclude that the Export Clause does not permit assessment of nondiscriminatory federal taxes on goods in export transit. Reexamination of the question whether a particular assessment on an activity or service is so closely connected to the goods as to amount to a tax on the goods themselves must await another day. We decline to overrule *Thames & Mersey.* The judgment of the Court of Appeals for the Federal Circuit is affirmed.

It is so ordered.

JUSTICE STEVENS took no part in the consideration or decision of this case.

JUSTICE KENNEDY, with whom JUSTICE GINSBURG joins, dissenting.

The Court today holds a federal statute unconstitutional without giving heed to the simplest reason for sustaining it. We granted certiorari on the question "[w]hether, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad, the tax imposed by Section 4371 of the Internal Revenue Code violates the Export Clause of the Constitution of the United States (U. S. Const. Art. I, § 9, Cl. 5)," Pet. for Cert. I. A straightforward answer to the question presented requires us to address the narrow issue of the continuing validity of our holding in *Thames & Mersey Marine Ins. Co.* v. *United States,* 237 U. S. 19 (1915), that a general tax on certain insurance premiums, as applied to exporters, is a prohibited tax on export goods.

Rejecting this course, the Court ventures upon a broad constitutional inquiry not even implicated by the statute. To do so, it rewrites the question presented. In the first sentence of the opinion, the Court says, "We resolve in this case whether the Export Clause of the Constitution permits the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit," *ante*, at 845. In so reformulating the question, the Court makes the assumption that § 4371's insurance tax is a tax on export goods, thereby adopting the premise of *Thames & Mersey* that I had thought we were to address. In the end the Court assumes the statute to be invalid rather than deciding it to be so. I find no precedent for setting aside an Act of Congress in this peremptory way. Worse yet, the Court's assumption is wrong; because § 4371 taxes a service distinct from the goods and is not a proxy for taxing the goods, it does not fall within the prohibition of the Export Clause. The Court thus carves out an undeserved exemption from § 4371 for exporters, adding significant complexity to its administration. Moreover, in a case in which the Export Clause should not even apply, the Court tackles the great problem of reconciling our Export Clause jurisprudence with modern decisions interpreting the Commerce and Import-Export Clauses, U. S. Const., Art. I, § 8, cl. 2, and Art. I, § 10, cl. 2. This is unwise and unnecessary. I would limit the inquiry to a reconsideration of *Thames & Mersey*, and uphold the statute as applied to respondent. With respect, I dissent.

I

We consider a rather simple federal tax. Section 4371 of the Internal Revenue Code imposes a tax of "4 cents on each dollar, or fractional part thereof, of the premium paid on the policy of casualty insurance or the indemnity bond, if issued to or for, or in the name of, an insured . . . ." 26 U. S. C. § 4371(1) (1982 ed.). The term "insured" is defined to include any "domestic corporation or partnership, or an individual resident of the United States, against, or with respect to, hazards, risks, losses, or liabilities wholly or partly within the United States . . . ." § 4372(d)(1). The statute does not discriminate against exports. Indeed, it does not even mention them. The tax must be paid not only by domestic traders but also by any insured, even an individual, who is covered in whole or in part for domestic casualty risks. The purpose of the tax is to "eliminate an unwarranted competitive advantage now favoring foreign insurers," H. R. Rep. No. 2333, 77th Cong., 2d Sess., 61 (1942), who do not pay federal income tax. Cf. 26 U. S. C. § 4373(1) (1982 ed.) (exempting from § 4371 any policy issued by a foreign insurer that is "signed or countersigned by an officer or agent of the insurer in a State, or in the District of Columbia, within which such insurer is authorized to do business" and is therefore subject to the income tax).

Resolution of the case requires us to determine whether the Export Clause has any bearing on taxes on services like insurance provided to exporters, where the service itself is not exported. The plain text of the Clause casts much doubt on the proposition. It states: "No Tax or Duty shall be laid on Articles exported from any State," U. S. Const., Art. I, § 9, cl. 5. The majority avoids this necessary question by asserting that the Government failed to argue the point and so abandoned it. *Ante*, at 855, and n. 3. True, the Government defends § 4371 on the ground that it does not discriminate between exports and other forms of trade, but this is not a concession that there is no distinction between a tax on insurance premiums and a tax on goods. In fact, the Government makes repeated references to the distinction in its briefs, albeit in the context of discussing the nondiscriminatory character of § 4371. See, *e. g.*, Brief for United States 12–13 (The tax "does not apply specifically to export transactions; to the contrary, it applies only to insurance risks that are either 'wholly' or 'partly' domestic"); *id.*, at 15 ("The tax imposed by Section 4371 of the Internal Revenue Code is not specifically directed to nor directly 'laid on Articles exported' (U. S. Const. Art. I, § 9, Cl. 5). Instead, it applies to insurance premiums paid to foreign insurers for many forms of insurance, including any casualty risk that is 'wholly or partly within the United States' (26 U. S. C. § 4372(d)(1))"); *id.*, at 34 ("Even as applied to casualty insurance, the tax unquestionably has only an incidental and remote relationship to exports and the export process . . .").

At oral argument, the Assistant to the Solicitor General acknowledged that he had not made a separate argument based on the distinction between export goods and services related to the exporting process. He explained that the nondiscrimination theory had greater utility, sparing courts the nettlesome inquiry into what is an export. Tr. of Oral Arg. 9. When asked why the Government was avoiding the simpler and clearer argument that § 4371 was just a tax on foreign insurers to offset the tax burdens borne by domestic insurers, he responded, "We do not mean to avoid that argument. That's part of our argument of why this is a tax of general application." *Id.*, at 12. Later in oral argument, he stated that "it's problematic to describe a tax on insurance as a tax on the good," and cited that problem as a reason for calling into question our decision in *Thames & Mersey.* Tr. of Oral Arg. 40. When asked if his position had foreclosed us from deciding the case on that basis, he responded: "I don't believe you're foreclosed . . . by our concession from addressing that issue as you see fit." *Ibid.* We have relied on statements more equivocal than this to reconsider and overrule a bad precedent even when the parties in their briefs had argued that the precedent should be upheld. See *Blonder-Tongue Laboratories, Inc.* v. *University of Ill. Foundation,* 402 U. S. 313, 319–320 (1971).

The Court's faulty characterization of the Government's argument leads it down some odd byways. For example, in Part III–B–3, the Court rejects the Government's attempt to rely upon *Department of Revenue of Wash.* v. *Association of Wash. Stevedoring Cos.,* 435 U. S. 734 (1978), where we held that a state tax of general applicability imposed upon a stevedoring firm did not violate the Import-Export Clause even though it may have added to the cost of importing and exporting. The Court points out that the tax in *Washington Stevedoring* did not fall directly on the goods, *ante,* at 861, and that we reserved the question whether States could tax goods in import or export transit, *ante*, at 862 (citing 435 U. S., at 757, n. 23). So, in the Court's view, *Washington Stevedoring* does not support the Government's argument that "Congress [may] impose generally applicable, nondiscriminatory taxes that fall directly on exports in transit," *ante*, at 861. The Government never argues that § 4371 imposes a tax on goods in transit, however. See, *e. g.*, Brief for United States 15 (the tax imposed by § 4371 "does not fall specifically on articles of export or export transactions"). If the Government can be faulted, it is for urging us to uphold § 4371 on a broad theory (a tax that does not discriminate against exports is valid) rather than the narrow theory subsumed within it (this particular tax does not fall on export goods at all). Nothing in the Government's argument prevents us from deciding the case on the narrower ground.

Even were we to suppose that the Government did not argue the goods and services distinction, the prudential rule against deciding a case on an unargued theory is in any event not absolute. See *Arcadia* v. *Ohio Power Co.*, 498 U. S. 73, 77 (1990); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 77–78 (1938) (overturning *Swift* v. *Tyson*, 16 Pet. 1 (1842), as unconstitutional); see also 304 U. S., at 82 (Butler, J.) (pointing out that no constitutional question was argued or briefed either in this Court or the court below). Cf. *Evans* v. *United States*, 504 U. S. 255, 269 (1992) (addressing a theory not argued by the parties but advanced by JUSTICE THOMAS in dissent); *United States* v. *Burke*, 504 U. S. 229, 246 (1992) (SCALIA, J., concurring in judgment). This rule has less force when the issue before us is whether it is constitutional to apply the statute where Congress intended it to apply. The predicate question of whether the Export Clause prohibits taxes on distinct services like insurance is "essential to the analysis" of the question presented, *Procunier* v. *Navarette*, 434 U. S. 555, 559–560, n. 6 (1978), and necessary to "an intelligent resolution of the constitutionality" of the statute, *Vance* v.

Terrazas, 444 U. S. 252, 258, n. 5 (1980). It is before us and should be decided. See this Court's Rule 14.1(a) ("The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein").

To give Congress the respect it is owed, we must decide whether the statute is in fact unconstitutional as applied, not make the borderline call that the Government's litigation position bars us from reaching a question which, as the Court seems to agree, is presented by the case. In interpreting statutes, for example, we have long observed "[t]he elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper* v. *California*, 155 U. S. 648, 657 (1895). See also *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"); *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804).

> "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988).

We have not considered ourselves foreclosed from adopting saving constructions the parties failed to suggest. See, *e. g.*, *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 389–391 (1924) (interpreting Jones Act to allow action to be brought in admiralty); cf. Brief for Plaintiff-in-Error 9–22 and Brief for

Defendant-in-Error 3–12, in *Panama R. Co.* v. *Johnson*, O. T. 1923, No. 369. We cannot here avoid a constitutional question by statutory construction, but we should take all measures to avoid declaring that Congress "usurp[ed] power constitutionally forbidden it," *DeBartolo, supra*, at 575. The majority cites no case in which we have declared a federal statute unconstitutional by disregarding an unargued theory that would save the statute, and I am not aware of any. We should at least consider a construction of the Export Clause that would render it inapplicable to the statute, rather than assuming the issue away and reaching the unnecessary judgment that a coordinate branch violated the Constitution.

There may be instances, even in constitutional cases, when we should eschew alternative theories for sustaining a statute. For example, we might do so if the theories depend upon different provisions of law or require factual development and legal analysis far afield from that done by the parties or the courts below. That is not this case. The question whether the Export Clause applies to taxes on distinct export-related services requires most of the same inquiries the majority undertakes: construing the text of the Export Clause, considering its history and purpose, and reviewing our precedents. It also requires explicit reexamination of the reasoning of *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U. S. 19 (1915), which the Government has asked us to overrule, in particular the idea that a tax on insurance premiums is a tax on the goods. The last is the only step the Court refuses to take.

There is not, as the Court intimates, *ante*, at 855, a need for statistical development of the relative incidence of this tax on exporters, unless the Court (as appears unlikely) is interested in the statistics from 1942 to determine if the statute was a pretext when it was enacted. The current incidence of the tax on exporters, whatever it is, will reflect market conditions in light of the operation of this tax over more than 50 years, including the strength of foreign insurers in certain lines exporters purchase, cf. R. Holtom, Underwriting Principles & Practices 451 (3d ed. 1987) (ocean marine insurance dominated by foreign companies). There is no law prohibiting persons from being insured under policies of foreign insurers issued abroad, and nothing in the statute exempts nonexporters from its operation. The Court has all the information it needs to decide this case on the proper basis, and it should not rest its decision that § 4371 is unconstitutional upon a dubious assumption that a general tax on insurance premiums is a tax on export goods.

In *Massachusetts* v. *United States,* 333 U. S. 611 (1948), the Government had conceded certain matters of statutory construction which, we felt, undermined its entire position. *Id.,* at 624. We refused to accept those concessions, and, giving the statute its proper interpretation, ruled in the Government's favor. *Id.,* at 625. It mystifies me that in a constitutional case, where our decision is not subject to congressional revision, the Court here accepts the Government's purported concession of the meaning of the Export Clause without any independent examination of the question, and then invokes the Clause to strike down a statute. See *Torres* v. *Puerto Rico,* 442 U. S. 465, 471, n. 3 (1979) ("[E]ven an explicit concession" by the Commonwealth of Puerto Rico that it was subject to the requirements of the Fourth Amendment would not "relieve this Court of the performance of the judicial function of deciding the issue") (internal quotation marks omitted).

Quite apart from the unnecessary judgment that an Act of Congress is unconstitutional as applied, today's decision adds significant complexity to the administration of § 4371. Under the thumb of the Court's holding that all premiums paid to insure export goods are exempt from § 4371, but also under the statutory mandate to collect the tax in all other instances, the Internal Revenue Service (IRS) henceforth finds itself faced with an array of new problems unexplained and unmentioned by the Court. Insurance is one of the most complex of businesses, with a multitude of coverage and policy options in different product lines, all generated and still evolving in pursuit of the profitable and efficient underwriting of risks. Not every case will fit the simple model here: a policy written for a single shipment; coverage beginning only with a common carrier picking up the goods from the warehouse or manufacturing plant; simple ascertainment of point of entry into the export stream. Stipulation of Facts ¶¶ 13, 16, App. to Pet. for Cert. 37a, 39a; cf. *A. G. Spalding & Bros.* v. *Edwards,* 262 U. S. 66, 68–69 (1923) (delivery to common carrier signals commencement of export).

Commercial inland marine transit insurance, the form of casualty insurance which covers domestic transportation of goods, "is usually written on an open basis, under which all shipments of the kind of merchandise described in the policy are covered." Holtom, *supra,* at 435. It would appear, from today's decision, that if a company has an open policy from a foreign insurer covering the domestic leg of the journey for all shipments, the IRS must untangle what portion of the insurance covered goods that had commenced the process of exportation, and then prorate the tax. So too would proration (or some other accommodation) appear necessary if the policy is taken out on a single shipment but part of the shipment is delivered within the country and part abroad.

In addition, the Court's decision draws the IRS into the factual morass of determining when exportation has begun. That will often be less clear than it is here. For example, a company may have its own trucks carry goods to a freight forwarder or port, or a hiatus in the journey might be extensive enough to remove the goods from the export stream, see *Joy Oil Co.* v. *State Tax Comm'n,* 337 U. S. 286, 288–289 (1949); since "not every preliminary movement of goods toward eventual exportation" triggers the constitutional immunity, *Kosydar* v. *National Cash Register Co.,* 417 U. S. 62, 69, n. 6 (1974), the determination of the commencement of exportation is another layer of complexity added to the administration of § 4371. Finally, the IRS now must determine which of the many, ever evolving types of insurance fall within the broad prohibition of *Thames & Mersey* against any tax that burdens the exporting process. See 237 U. S., at 27. Truckers, for example, often take insurance out to cover liability for the loss or damage to merchandise that they are carrying. Holtom, *supra*, at 435. The cost of that insurance, which may be specific to an export shipment and related to the value of the goods, is likely passed through in some measure to the exporter and therefore "falls upon the exporting process," *Thames & Mersey*, 237 U. S., at 27. Questions will also arise whether it violates the Export Clause to tax insurance taken out by an export freight-forwarder to cover a warehouse storing goods in transit, or to tax ocean marine protection and indemnity insurance taken out by a vessel owner to protect against damage to export cargo, cf. Holtom, *supra*, at 452, if part of the risk covered is domestic.

The severity of these administrative burdens will depend in part upon the penetration of the domestic market by foreign insurers in certain lines. We can anticipate increased burdens with the 4% price cut in foreign insurance for exporters that results from today's decision. The Court is wrong to frustrate the will of Congress by giving exporters an undeserved exemption from § 4371 and by adding needless complexity to the administration of the statute, all upon the incorrect, unexamined assumption that the tax is on exported goods.

II

Turning to the question that I take to be dispositive, I would hold that the Export Clause does not apply to § 4371. The text and history of the Clause, and its interpretation by the Fifth Congress, suggest that taxes on insurance do not fall within its prohibitions. Because § 4371 taxes a service distinct from the actual export of the goods, and does not function as a proxy for taxing their value, I would uphold its application to International Business Machines Corporation (IBM).

In my view, the Framers understood the Export Clause to prohibit what its text says: any federal tax "laid on Articles exported," U. S. Const., Art. I, § 9, cl. 5, not taxes on services like insurance that may have indirect effect on the cost of exporting. There was a history of nations' imposing onerous taxes on exported goods, even in England until the rise of mercantilist trade policy resulted in the repeal of most export taxes by the end of the 17th century, see W. Kennedy, English Taxation 1640–1799, p. 35 (1913). And specific taxes on exported goods were the only taxes mentioned in the debate at the Constitutional Convention over the Export Clause. For example, Gouverneur Morris of Pennsylvania, opposing the Clause, favored taxing exports as an alternative to direct taxes on individuals.

> "He considered the taxing of exports to be in many cases highly politic. Virginia has found her account in taxing Tobacco. All Countries having peculiar articles tax the exportation of them; as France her wines and brandies. A tax here on lumber, would fall on the W. Indies & punish their restrictions on our trade. The same is true of live-stock and in some degree of flour. In case of a dearth in the West Indies, we may extort what we please. Taxes on exports are a necessary source of revenue. For a long time the people of America will not have money to pay direct taxes. Seize and sell their effects and you push them into Revolts." 2 M. Farrand, Records of the Federal Convention of 1787, p. 307 (rev. ed. 1966).

See also *id.*, at 306 (Mr. Madison: taxes on exported goods, like tobacco, in which Americans were unrivalled would shift the tax burden to foreigners); *id.*, at 360 (Gouverneur Morris: taxes on goods are essential to embargoes, while taxes on ginseng and ship masts would shift the tax burden abroad, and taxes on skins, beavers, and other raw materials might encourage American manufactures); *id.*, at 361 (Mr. Dickenson *[sic]:* suggesting exemption of certain articles from the Export Clause); *id.*, at 362 (Mr. Fitzimmons: discussing duties imposed on wool by Great Britain). Proponents of the Export Clause also focused on taxes on goods. *Id.*, at 307 (Mr. Mercer: a tax on exported goods encourages the raising of articles not meant for exportation); *id.*, at 360 (Mr. Williamson: discussing taxation of North Carolina tobacco by Virginia); *id.*, at 361 (Mr. Sherman: general prohibition on power to tax exports necessary because "[a]n enumeration of particular articles would be difficult invidious and improper"); *id.*, at 363 (Colonel Mason: discussing Virginia tax on tobacco; Mr. Clymer: discussing middle States' apprehensions of taxes on products like wheat flour and provisions that, unlike tobacco and rice, were sold in competitive markets). Oliver Ellsworth of Connecticut even contended that he opposed export taxes in part because "there are indeed but a few articles that could be taxed at all; as Tobo. rice & indigo, and a tax on these alone would be partial & unjust." *Id.*, at 360.

In interpreting constitutional restrictions on the taxing power, we must recall that the want of this power in the National Government was one of the great weaknesses of the Articles of Confederation. With its expenses outpacing revenues from requisitions from the States, the central Government had emptied its vaults by 1782 and soon defaulted on its substantial debt. R. Paul, Taxation in the United States 4–5 (1954). As the Convention records indicate, depriving the Federal Government of the power to tax even export goods was a contentious issue, given the concern that it would cut off a needed source of revenue as well as disable Congress from using export taxes as an instrument of policy. Madison's last-minute proposal that the Export Clause's total prohibition on taxing exports be replaced with a provision requiring a two-thirds vote of each House failed by the vote of only one State. 2 Farrand, *supra*, at 363. There is no cause for extending the Export Clause beyond the bargain struck at the Convention and embodied in its text.

There is other compelling historical evidence weighing against *Thames & Mersey*'s view of the Export Clause as a prohibition extending even to taxes on services that have the indirect effect of raising exportation costs. In 1797 the Fifth Congress passed "An Act laying Duties on stamped Vellum, Parchment and Paper." Among its provisions was a stamp duty upon

> "any policy of insurance or instrument in nature thereof, whereby any ships, vessels or goods going from one district to another in the United States, or from the United States to any foreign port or place, shall be insured, to wit, if going from one district to another in the United States, twenty-five cents; if going from the United States to any foreign port or place, when the sum for which insurance is made shall not exceed five hundred dollars, twenty-five cents; and when the sum insured shall exceed five hundred dollars, one dollar . . . ." Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527.

The duties survived until the unpopular Federalist tax system, which was felt to bear too heavily upon those least able to pay, was abolished soon after Jefferson took office. See Paul, *supra*, at 6.

We have always been reluctant to say a statute of this early origin offends the Constitution, absent clear inconsistency. See *Knowlton* v. *Moore*, 178 U. S. 41, 56 (1900) (imposition of legacy taxes in the same 1797 statute casts doubt on claim that Congress lacks such power); see *Ludecke* v. *Watkins*, 335 U. S. 160, 171 (1948) ("The [Alien Enemy Act of 1798] is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights"). The 1797 statute should dispel any doubt on the issue. Taxes on insurance do not offend the Export Clause. It is not likely, moreover, that the Act was passed to circumvent the Export Clause. The early Congresses were scrupulous in honoring the Export Clause by making specific exemptions for exports in laws imposing general taxes on goods. See, *e. g.*, Act of Mar. 3, 1791, ch. 15, § 51, 1 Stat. 199, 210–211 (tax on distilled spirits); Act of June 5, 1794, ch. 51, § 14, 1 Stat. 384, 387 (tax on snuff and refined sugar). Their refusal to grant exporters similar exemptions from insurance taxes indicates that those taxes were not viewed as equivalent to taxes on goods.

In *Fairbank* v. *United States*, 181 U. S. 283 (1901), the Court struck down an 1898 statute imposing a stamp tax on an export bill of lading despite a similar tax in the 1797 statute. The decision in *Fairbank* was 5–4, with a strong dissent from the first Justice Harlan urging deference to the implicit exposition of the Export Clause by the Fifth Congress. The Court, though, reserved the contemporaneous-exposition rule for " 'doubtful cases,' " *id.*, at 311, and had no doubt that the "discriminating and excessive tax" imposed on export bills of lading in the 1898 Act (10 times that imposed on internal bills of lading, *id.*, at 290) was unconstitutional.

There is no need to reconsider *Fairbank*, nor to distinguish it by sole reliance upon the interpretation offered in *Washington Stevedoring*, which observed that the stamp duty at issue in *Fairbank* "effectively taxed the goods because the bills represented the goods," 435 U. S., at 756, n. 21. The tax here, unlike the stamp duty in *Fairbank*, does not discriminate against exports; it taxes a service distinct from the act of exporting; and it has the clear regulatory purpose of eliminating a perceived competitive advantage of foreign insurers. Viewed in this light, the conclusion of the Fifth Congress that the Export Clause did not bar any tax on export insurance should have great weight in assessing the constitutionality of § 4371, and *Fairbank* is not to the contrary.

Turning once more to *Thames & Mersey,* I note the 1797 statute was neither briefed to the Court there nor discussed in its opinion. The Court, furthermore, did not examine the text or history of the Export Clause, relying instead on the broad theory of the Clause espoused in the companion case, *United States* v. *Hvoslef,* 237 U. S. 1 (1915): namely, that it meant the "process of exporting . . . should not be obstructed or hindered by any burden of taxation," *id.*, at 13 (internal quotation marks and citation omitted). See *Thames & Mersey,* 237 U. S., at 25. (*Hvoslef*'s holding that a nondiscriminatory tax on charter parties was unconstitutional as applied to export shipments, by the way, is also called into question by the 1797 Act, which imposed a similar tax.)

Besides failing to consider the evidence just cited, the *Thames & Mersey* Court relied in part on the theory that insurance is not commerce and so, by implication, the regulatory aspect of the tax could not be justified as an exercise of Congress' Commerce Clause power. See *Thames & Mersey, supra,* at 25, citing *Paul* v. *Virginia,* 8 Wall. 168 (1869). As a result, the Court reasoned, an insurance policy was simply a personal contract and a document which, by custom, was a necessary part of every export transaction. 237 U. S., at 25–26. A tax on the premiums of such a policy, which fell upon the exporting process and increased its costs, was thought to be the equivalent to a tax laid on charter parties, bills of lading, or the goods themselves. *Id.*, at 27. We abandoned long ago the notion that insurance is not commerce and so beyond the power of Congress to regulate. See *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 543–545 (1944). Congress enacted § 4371 to regulate competition within the insurance field, and its authority to do so ought not to be impaired by a strained reading of the Export

Clause or reliance on the outmoded reasoning of *Thames & Mersey.*

We have discarded, in Import-Export Clause cases, the idea afoot in *Hvoslef* and *Thames & Mersey* that a tax on services necessary to the export process is equivalent to a tax on goods. In *Canton R. Co.* v. *Rogan,* 340 U. S. 511 (1951), the Court upheld a state gross-receipts tax on a steam railroad, even as applied to the railroad's handling of exports and imports from its marine terminal in the port of Baltimore. The tax was "not on the *goods* but on the *handling* of them at the port," we said, and "when the tax is on activities connected with the export or import the range of immunity cannot be so wide." *Id.,* at 514–515. Following *Canton,* the Court in *Washington Stevedoring* decided that taxes on services may be permissible even if levied upon an activity, such as stevedoring, which occurs while imports and exports are in transit. We remarked: "The transportation services in both settings are necessary to the import-export process. Taxation in neither setting relates to the value of the goods, and therefore in neither can it be considered taxation upon the goods themselves." 435 U. S., at 757. The distinctions drawn between services and goods in those cases did not depend on the differences between the text of the Export and Import-Export Clauses, and should be observed here.

The Court's effort to justify its decision on the grounds of *stare decisis, ante,* at 856, is unconvincing. *Stare decisis* does not protect a constitutional decision where the reasoning is as poor as it is in *Thames & Mersey,* see *Smith* v. *Allwright,* 321 U. S. 649, 665 (1944), nor when the precedent, even if not yet proved unworkable, is at odds with more recent cases, see *Fulton Corp.* v. *Faulkner,* 516 U. S. 325, 345–346 (1996). It is, moreover, just a matter of time before *Thames & Mersey* proves itself unworkable; prior to today, it had not been given the chance to work its mischief on § 4371.

As we move to a more service-intensive and export-oriented economy, and as policymakers and experts debate the wisdom of shifting from income to excise taxes, see Lugar, The National Sales Tax: Avoiding the Zero-Sum Scenario, 48 Tax Executive 26 (1996); Bartlett, Replacing Federal Taxes with a Sales Tax, 68 Tax Notes 997 (1995), we should not use shaky precedent to deprive Congress of important regulatory and revenue-raising options. As respondent conceded at oral argument, Tr. of Oral Arg. 31, the reasoning of *Thames & Mersey* invites claims by export service providers for exemptions from any number of federal excise taxes, for example, a challenge to the diesel-fuel tax, 26 U. S. C. §4041, by truckers carrying export shipments. The Export Clause cannot bear this reading.

The protections of the Export Clause must extend, perhaps, somewhat beyond specific taxes on goods, for "[i]f it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it." *Hvoslef, supra,* at 13. As a result, the Court has found certain taxes to be proxies for taxes on the goods. See *Washington Stevedoring, supra,* at 756, n. 21 (discussing sales tax struck down in *Richfield Oil Corp.* v. *State Bd. of Equalization,* 329 U. S. 69 (1946), and the tax on a bill of lading struck down in *Fairbank* v. *United States,* 181 U. S. 283 (1901)). In *Washington Stevedoring,* we expressed some doubt that the tax on insurance in *Thames & Mersey* fell in this forbidden category, but, to avoid overruling the case, "note[d] that the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships." 435 U. S., at 756, n. 21.

The insurance premiums taxed here, like those taxed in *Thames & Mersey,* bear some relation to the value of the goods, but this does not make them a proxy for a tax on the goods. Premiums, *i. e.,* the price of insurance, depend on risk of loss, and value of the goods is only one component factor of risk. So much is made clear by Stipulation 16 in this case. Before the premiums for a shipment of IBM goods of a certain value could be fixed, a premium rate had to be determined. The rate was a function of the risk factors specific to a particular shipment: "the place of origin and destination of the goods, the type of goods involved and how they were packaged, the time and distance of the trip, the route and mode(s) of transportation, and the amount of material handling expected during the trip." Premiums were then determined by multiplying the value of the goods by the shipment-specific premium rate. Stipulation of Facts ¶ 16, App. to Pet. for Cert. 39a. Cf. Holtom, Underwriting Principles & Practices, at 453–457 (discussing various factors taken into account in underwriting ocean marine insurance, such as nationality of the crew, vessel management, seaworthiness of the vessel, suitability of the vessel for specific cargo, packaging, season of travel, perishability, pilferage risks at ports of call, and risks of damage from accompanying cargo). The premium charged to insure a million dollars of goods for the short overland journey from IBM's computer factory in Richfield, Minnesota, to a customer in Quebec would be trifling in comparison to the premium charged to insure transport of goods of equivalent value from its factory in San Jose, California, across the continent east to New York and then by sea to Russia. Cf. Stipulation of Facts, App. to Pet. for Cert. 36a–37a; Brief for Respondent 3, n. 2. Given the stipulated, undeniable premise that premiums are graded by risk of loss, they are not a predictable proxy for a Congress intent upon taxing export value. Premiums are a rough proxy, however, for the income of foreign insurers, which is why a Congress intent on eliminating the income tax advantages of those insurers would structure § 4371 as it did.

Section 4371's requirement that the insurance cover domestic risks in whole or in part is further evidence that Congress did not intend it to operate as a proxy for taxing exports. A statute that exempts all exporters who use a domestic insurer for the inland leg of a shipment is not an effective instrument for taxing export goods.

I would uphold §4371 as applied to IBM because the statute imposes a tax on a distinct export-related service and is not a proxy for a tax on the exports themselves. The Court, in my view, makes a serious mistake in assuming the opposite and reaching the question whether a nondiscriminatory tax on goods violates the Export Clause. I would reverse the judgment of the Court of Appeals for the Federal Circuit.

LOCKHEED CORP. ET AL. *v.* SPINK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95–809. Argued April 22, 1996—Decided June 10, 1996

Because respondent Spink was 61 when petitioner Lockheed Corporation reemployed him in 1979, he was excluded from participation in Lockheed's retirement plan (Plan), as was then permitted by the Employee Retirement Income Security Act of 1974 (ERISA). Section 9203(a)(1) of the Omnibus Budget Reconciliation Act of 1986 (OBRA) repealed ERISA's age-based exclusion provision, and §§ 9201 and 9202 amended ERISA and the Age Discrimination in Employment Act of 1967 (ADEA), respectively, to prohibit age-based benefit accrual rules. To comply with OBRA, Lockheed made Spink and other previously excluded employees Plan members, but made clear that they would not receive credit for their pre-1988 service years. Lockheed subsequently added to the Plan two programs offering increased pension benefits to employees who would retire early in exchange for their waiver of any employment claims against Lockheed. Not wishing to waive any ADEA or ERISA claims, Spink declined to participate and retired without earning the extra benefits. He then filed suit, alleging among other things that Lockheed and petitioner board of directors members violated ERISA by amending the Plan to create the retirement programs, that petitioner Retirement Committee members violated ERISA by implementing the amended Plan, and that the OBRA amendments to ERISA and the ADEA required that Spink's pre-1988 service years be counted toward his benefits. The District Court dismissed the complaint for failure to state a claim, but the Court of Appeals reversed in relevant part. In finding the Plan amendments unlawful under ERISA § 406(a)(1)(D)—which prohibits a fiduciary from causing a plan to engage in a transaction that transfers plan assets to, or involves the use of plan assets for the benefit of, a party in interest—the court decided that there was no need to address Lockheed's status as a fiduciary. It also found that Lockheed's refusal to credit Spink with his pre-1988 service years violated the OBRA amendments, which the court decided applied retroactively.

Held:

1. ERISA § 406 does not prevent an employer from conditioning the receipt of early retirement benefits upon plan participants' waiver of employment claims. Pp. 887–895.

(a) Unless a plaintiff shows that a fiduciary caused the plan to engage in the allegedly unlawful transaction, there can be no § 406(a)(1) violation warranting relief. Cf. *Peacock* v. *Thomas*, 516 U. S. 349, 353. Thus, the Court of Appeals erred by not asking whether fiduciary status existed in this case before finding a § 406(a)(1)(D) violation. Pp. 888–889.

(b) Lockheed and the board of directors, as plan sponsors, were not acting as fiduciaries when they amended the Plan. Given ERISA's definition of fiduciary and the applicability of the duties attending that status, the rule that this Court announced with respect to the amendment of welfare benefit plans in *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U. S. 73, applies equally to the amendment of pension plans. Thus, when employers or other plan sponsors adopt, modify, or terminate pension plans, they do not act as fiduciaries, *id.*, at 78, but are analogous to settlors of a trust. Pp. 889–891.

(c) It is not necessary to decide whether the Retirement Committee members acted as fiduciaries, because their payment of benefits pursuant to the terms of an otherwise lawful plan was not a "transaction" prohibited by § 406(a)(1)(D). That section does not in direct terms include an employer's payment of benefits. And the "transactions" prohibited by other provisions of § 406(a) generally involve uses of plan assets that are potentially harmful to the plan. The payment of benefits conditioned on performance by plan participants cannot reasonably be said to share that characteristic. Pp. 892–895.

2. OBRA §§ 9201 and 9202(a) do not apply retroactively to require Lockheed to use pre-1988 service years in calculating Spink's benefits. Congress expressly provided, in OBRA § 9204(a)(1), that the amendments to ERISA and the ADEA would be effective with respect to plan years beginning on or after January 1, 1988. Since the amendments' temporal effect is manifest on the statute's face, "there is no need to resort to judicial default rules," *Landgraf* v. *USI Film Products*, 511 U. S. 244, 280, and inquiry is at an end. Pp. 896–897.

60 F. 3d 616, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, and GINSBURG, JJ., joined, and in which SOUTER and BREYER, JJ., joined as to all but Part III–B. BREYER, J., filed an opinion concurring in part and dissenting in part, in which SOUTER, J., joined, *post*, p. 898.

Gordon E. Kirscher argued the cause for petitioners. With him on the briefs were *David E. Gordon*, *Kenneth E. Johnson*, *Kenneth S. Geller*, and *Ralph A. Hurvitz*.

Richard P. Bress argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days, Assistant Attorney General Argrett, Edwin S. Kneedler, Kenneth L. Greene, J. Davitt McAteer, Allen H. Feldman,* and *Edward D. Sieger.*

Theresa M. Traber argued the cause for respondent. With her on the brief was *Bert Voorhees.**

JUSTICE THOMAS delivered the opinion of the Court.

In this case, we decide whether the payment of benefits pursuant to an early retirement program conditioned on the participants' release of employment-related claims constitutes a prohibited transaction under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* We also determine whether the 1986 amendments to ERISA and the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*, forbidding age-based discrimination in pension plans apply retroactively.

I

Respondent Paul Spink was employed by petitioner Lockheed Corporation from 1939 until 1950, when he left to work for one of Lockheed's competitors. In 1979, Lockheed persuaded Spink to return. Spink was 61 years old when he resumed employment with Lockheed. At that time, the terms of the Lockheed Retirement Plan for Certain Salaried Individuals (Plan), a defined benefit plan, excluded from participation employees who were over the age of 60 when hired. This was expressly permitted by ERISA. See 29 U. S. C. § 1052(a)(2)(B) (1982 ed.).

---

*Briefs of *amici curiae* urging reversal were filed for the ERISA Industry Committee by *Michael E. Horne* and *John M. Vine;* for the Equal Employment Advisory Council by *Douglas S. McDowell* and *Ellen Duffy McKay;* and for the New England Legal Foundation by *William J. Kilberg, Peter H. Turza, Paul Blankenstein, Mark Snyderman,* and *Stephen S. Ostrach.*

Briefs of *amici curiae* urging affirmance were filed for the American Association of Retired Persons by *Cathy Ventrell-Monsees* and *Mary Ellen Signorille;* for the Engineers and Scientists Guild, Lockheed Section, by *Stuart Libicki;* and for the National Employment Lawyers Association by *Stephen R. Bruce, Ronald Dean,* and *Jeffrey Lewis.*

Briefs of *amici curiae* were filed for the American Academy of Actuaries et al. by *Lauren M. Bloom;* and for the Chamber of Commerce of the United States by *Hollis T. Hurd, Stephen A. Bokat,* and *Robin S. Conrad.*

Congress subsequently passed the Omnibus Budget Reconciliation Act of 1986 (OBRA), Pub. L. 99–509, 100 Stat. 1874. Section 9203(a)(1) of OBRA, 100 Stat. 1979, repealed the age-based exclusion provision of ERISA, and the statute now flatly mandates that "[n]o pension plan may exclude from participation (on the basis of age) employees who have attained a specified age." 29 U. S. C. § 1052(a)(2). Sections 9201 and 9202 of OBRA, 100 Stat. 1973–1978, amended ERISA and the ADEA to prohibit age-based cessations of benefit accruals and age-based reductions in benefit accrual rates. See 29 U. S. C. §§ 1054(b)(1)(H)(i), 623(i)(1).

In an effort to comply with these new laws, Lockheed ceased its prior practice of age-based exclusion from the Plan, effective December 25, 1988. As of that date, all employees, including Spink, who had previously been ineligible to participate in the Plan due to their age at the time of hiring became members of the Plan. Lockheed made clear, however, that it would not credit those employees for years of service rendered before they became members.

When later faced with the need to streamline its operations, Lockheed amended the Plan to provide financial incentives for certain employees to retire early. Lockheed established two programs, both of which offered increased pension benefits to employees who would retire early, payable out of the Plan's surplus assets. Both programs required as a condition of the receipt of benefits that participants release any employment-related claims they might have against Lockheed. Though Spink was eligible for one of the programs, he declined to participate because he did not wish to waive any ADEA or ERISA claims. He then retired, without earning any extra benefits for doing so.

Spink brought this suit, in his individual capacity and on behalf of others similarly situated, against Lockheed and several of its directors and officers. Among other things, the complaint alleged that Lockheed and the members of the board of directors violated ERISA's duty of care and prohibited transaction provisions, 29 U. S. C. §§ 1104(a), 1106(a), by amending the Plan to create the retirement programs. Relatedly, the complaint alleged that the members of Lockheed's Retirement Committee, who implemented the Plan as amended by the board, violated those same parts of ERISA. The complaint also asserted that the OBRA amendments to ERISA and the ADEA required Lockheed to count Spink's pre-1988 service years toward his accrued pension benefits. For these alleged ERISA violations, Spink sought monetary, declaratory, and injunctive relief pursuant to §§ 502(a)(2) and (3) of ERISA's civil enforcement provisions, 29 U. S. C. §§ 1132(a)(2), (3). Lockheed moved to dismiss the complaint for failure to state a claim, and the District Court granted the motion.

The Court of Appeals for the Ninth Circuit reversed in relevant part. 60 F. 3d 616 (1995). The Court of Appeals held that the amendments to the Plan were unlawful under ERISA § 406(a)(1)(D), 29 U. S. C. § 1106(a)(1)(D), which prohibits a fiduciary from causing a plan to engage in a transaction that transfers plan assets to a party in interest or involves the use of plan assets for the benefit of a party in interest. The court reasoned that because the amendments offered increased benefits in exchange for a release of employment claims, they constituted a use of Plan assets to "purchase" a significant benefit for Lockheed. 60 F. 3d, at 624. Though the court found a violation of § 406(a)(1)(D), it decided that there was no need to address Lockheed's status as a fiduciary. *Id.*, at 623, n. 5. In addition, the Court of

Appeals agreed with Spink that Lockheed had violated the OBRA amendments by refusing to include Spink's service years prior to 1988 in determining his benefits. In so holding, the court found that the OBRA amendments apply retroactively. See *id.*, at 620, n. 1. We issued a writ of certiorari, 516 U. S. 1087 (1996), and now reverse.

II

Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan. *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 91 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 511 (1981). ERISA does, however, seek to ensure that employees will not be left emptyhanded once employers have guaranteed them certain benefits. As we said in *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359 (1980), when Congress enacted ERISA it "wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Id.*, at 375. Accordingly, ERISA tries to "make as certain as possible that pension fund assets [will] be adequate" to meet expected benefits payments. *Ibid.*

To increase the chances that employers will be able to honor their benefits commitments—that is, to guard against the possibility of bankrupt pension funds—Congress incorporated several key measures into ERISA. Section 302 of ERISA sets minimum annual funding levels for all covered plans, see 29 U. S. C. §§ 1082(a), 1082(b), and creates tax liens in favor of such plans when those funding levels are not met, see § 1082(f). Sections 404 and 409 of ERISA impose respectively a duty of care with respect to the management of existing trust funds, along with liability for breach of that duty, upon plan fiduciaries. See §§ 1104(a), 1109(a). Finally, § 406 of ERISA prohibits fiduciaries from involving the plan and its assets in certain kinds of business deals. See § 1106. It is this last feature of ERISA that is at issue today.

Congress enacted § 406 "to bar categorically a transaction that [is] likely to injure the pension plan." *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S. 152, 160 (1993). That section mandates, in relevant part, that "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." 29 U. S. C. § 1106(a)(1)(D).[1] The question here is whether this provision of ERISA prevents an employer from conditioning the receipt of early retirement benefits upon the participants' waiver of employment claims. For the following reasons, we hold that it does not.

III

Section 406(a)(1) regulates the conduct of plan fiduciaries, placing certain transactions outside the scope of their lawful authority. When a fiduciary violates the rules set forth in § 406(a)(1), § 409 of ERISA renders him personally liable for any losses incurred by the plan, any ill-gotten profits, and other equitable and remedial relief deemed appropriate by the court. See 29 U. S. C. § 1109(a). But in order to sustain an alleged transgression of § 406(a), a plaintiff must show that a fiduciary caused the plan to engage in the allegedly unlawful transaction.[2] Unless a plaintiff can make that showing, there can be no violation of § 406(a)(1) to warrant relief under the enforcement provisions. Cf. *Peacock* v. *Thomas,* 516 U. S. 349, 353 (1996) ("Section 502(a)(3) 'does not, after all, authorize "appropriate equitable relief" *at large,* but only "appropriate equitable relief" for the purpose of "redress[ing any] violations or . . . enforc[ing] any provisions" of ERISA' ") (quoting *Mertens* v. *Hewitt Associates,* 508 U. S. 248, 253 (1993)). The Court of Appeals erred by not asking whether fiduciary status existed in this case before it found a violation of § 406(a)(1)(D).[3]

---

[1] Section 408 enumerates specific exceptions to the prohibitions in § 406. See 29 U. S. C. § 1108(b). Lockheed does not argue that any of these exceptions pertain to this case.

[2] ERISA § 3(21)(A) provides: "[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or

A

We first address the allegation in Spink's complaint that Lockheed and the board of directors breached their fiduciary

---

indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U. S. C. § 1002(21)(A).

[3] Instead of pursuing this inquiry, the Court of Appeals found that Lockheed was a "party in interest" under § 3(14)(C), and asserted that "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA." 60 F. 3d 616, 623 (CA9 1995). For that same proposition, several Courts of Appeals have relied on statements in *Mertens* v. *Hewitt Associates,* 508 U. S. 248 (1993), that "ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries," *id.,* at 253–254; see also *id.,* at 254, n. 4 (citing § 406(a)), and that "[p]rofessional service providers . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406," *id.,* at 262. See, *e. g., Reich* v. *Stangl,* 73 F. 3d 1027, 1031–1032 (CA10 1996), cert. pending, No. 95–1631; *Landwehr* v. *DuPree,* 72 F. 3d 726, 733–734 (CA9 1995); *Reich* v. *Compton,* 57 F. 3d 270, 285 (CA3 1995). Insofar as they apply to § 406(a), these statements in *Mertens* (which were in any event dicta, since § 406(a) was not at issue) suggest liability for parties in interest only when a violation of § 406(a) has been established—which, as we have discussed, requires a showing that a fiduciary caused the plan to engage in the transaction in question. The Court of Appeals thus was not necessarily wrong in saying that "a party in interest who benefitted from an *impermissible* transaction can be held liable under ERISA" (emphasis added); but the only transactions rendered impermissible by § 406(a) are transactions caused by fiduciaries.

duties when they adopted the amendments establishing the early retirement programs. Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries. As we said with respect to the amendment of welfare benefit plans in *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U. S. 73 (1995), "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Id.*, at 78 (citing *Adams* v. *Avondale Industries, Inc.*, 905 F. 2d 943, 947 (CA6 1990)). When employers undertake those actions, they do not act as fiduciaries, 514 U. S., at 78, but are analogous to the settlors of a trust, see *Johnson* v. *Georgia-Pacific Corp.*, 19 F. 3d 1184, 1188 (CA7 1994).

This rule is rooted in the text of ERISA's definition of fiduciary. See 29 U. S. C. § 1002(21)(A) (quoted n. 2, *supra*). As the Second Circuit has observed, "only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration," does a person become a fiduciary under § 3(21)(A). *Siskind* v. *Sperry Retirement Program, Unisys*, 47 F. 3d 498, 505 (1995). "[B]ecause [the] defined functions [in the definition of fiduciary] do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review." *Ibid.* We recently recognized this very point, noting that "it may be true that amending or terminating a plan . . . cannot be an act of plan 'management' or 'administration.'" *Varity Corp.* v. *Howe*, 516 U. S. 489, 505 (1996). As noted above, we in fact said as much in *Curtiss-Wright*, see 514 U. S., at 78, at least with respect to welfare benefit plans.

We see no reason why the rule of *Curtiss-Wright* should not be extended to pension benefit plans. Indeed, there are compelling reasons to apply the same rule to cases involving both kinds of plans, as most Courts of Appeals have done.[4] The definition of fiduciary makes no distinction between persons exercising authority over welfare benefit plans and those exercising authority over pension plans. It speaks simply of a "fiduciary with respect to a plan," 29 U. S. C. § 1002(21)(A), and of "management" and "administration" of "such plan," *ibid.* And ERISA defines a "plan" as being either a welfare or pension plan, or both. See § 1002(3). Likewise, the fiduciary duty provisions of ERISA are phrased in general terms and apply with equal force to welfare and pension plans. See, *e. g.*, § 1104(a) (specifying duties of a "fiduciary . . . with respect to a plan"). See also *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S., at 91 (ERISA "sets various uniform standards, including rules concerning . . . fiduciary responsibility, for both pension and welfare plans"). Given ERISA's definition of fiduciary and the applicability of the duties that attend that status, we think that the rules regarding fiduciary capacity—including the settlor-fiduciary distinction—should apply to pension and welfare plans alike.

Lockheed acted not as a fiduciary but as a settlor when it amended the terms of the Plan to include the retirement programs. Thus, § 406(a)'s requirement of fiduciary status is not met. While other portions of ERISA govern plan amendments, see, *e. g.*, 29 U. S. C. § 1054(g) (amendment generally may not decrease accrued benefits); § 1085b (if adoption of an amendment results in underfunding of a defined benefit plan, the sponsor must post security for the amount of the deficiency), the act of amending a pension plan does not trigger ERISA's fiduciary provisions.

---

[4] See, *e. g., Siskind* v. *Sperry Retirement Program, Unisys*, 47 F. 3d 498, 505 (CA2 1995); *Averhart* v. *US WEST Management Pension Plan*, 46 F. 3d 1480, 1488 (CA10 1994); *Fletcher* v. *Kroger Co.*, 942 F. 2d 1137, 1139–1140 (CA7 1991); *Hozier* v. *Midwest Fasteners, Inc.*, 908 F. 2d 1155, 1160–1162 (CA3 1990) (listing cases); *Sutton* v. *Weirton Steel Div. of Nat. Steel Corp.*, 724 F. 2d 406, 411 (CA4 1983), cert. denied, 467 U. S. 1205 (1984).

B

Spink also alleged that the members of Lockheed's Retirement Committee who implemented the amended Plan violated §406(a)(1)(D). As with the question whether Lockheed and the board members can be held liable under ERISA's fiduciary rules, the Court of Appeals erred in holding that the Retirement Committee members violated the prohibited transaction section of ERISA without making the requisite finding of fiduciary status. It is not necessary for us to decide the question whether the Retirement Committee members acted as fiduciaries when they paid out benefits according to the terms of the amended Plan, however, because we do not think that they engaged in any conduct prohibited by §406(a)(1)(D).

The "transaction" in which fiduciaries may not cause a plan to engage is one that "constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." 29 U. S. C. §1106(a)(1)(D). Spink reads §406(a)(1)(D) to apply in cases where the benefit received by the party in interest—in this case, the employer—is not merely a "natural inciden[t] of the administration of pension plans." Brief for Respondent 10. Lockheed, on the other hand, maintains that a plan administrator's payment of benefits to plan participants and beneficiaries pursuant to the terms of an otherwise lawful plan[5] is wholly outside the scope of §406(a)(1)(D). See Reply Brief for Petitioners 10. We agree with Lockheed.

Section 406(a)(1)(D) does not in direct terms include the payment of benefits by a plan administrator. And the surrounding provisions suggest that the payment of benefits is in fact not a "transaction" in the sense that Congress used that term in § 406(a). Section 406(a) prohibits fiduciaries from engaging the plan in the "sale," "exchange," or "leasing" of property, 29 U. S. C. § 1106(a)(1)(A); the "lending of money" or "extension of credit," § 1106(a)(1)(B); the "furnishing of goods, services, or facilities," § 1106(a)(1)(C); and the "acquisition . . . of any employer security or employer real property," § 1106(a)(1)(E), with a party in interest. See also § 1108(b) (listing similar types of "transactions"). These are commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length. See *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S., at 160. What the "transactions" identified in § 406(a) thus have in common is that they generally involve uses of plan assets that are potentially harmful to the plan. Cf. *id.*, at 160–161 (reasoning that a transfer of unencumbered property to the plan by the employer for the purpose of applying it toward the employer's funding obligation fell within § 406(a)(1)'s companion tax provision, 26 U. S. C. § 4975, because it could "jeopardize the ability of the plan to pay promised benefits"). The payment of benefits conditioned on performance by plan participants cannot reasonably be said to share that characteristic.

---

[5] As Lockheed notes, see Brief for Petitioners 13; Reply Brief for Petitioners 7, n. 4, there is no claim in this case that the amendments resulted in any violation of the participation, funding, or vesting requirements of ERISA. See 29 U. S. C. §§1051–1061 (participation and vesting); §§1081–1086 (funding).

According to Spink and the Court of Appeals, however, Lockheed's early retirement programs were prohibited transactions within the meaning of § 406(a)(1)(D) because the required release of employment-related claims by participants created a "significant benefit" for Lockheed. 60 F. 3d, at 624. Spink concedes, however, that among the "incidental" and thus legitimate benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily. Brief for Respondent 11.

We do not see how obtaining waivers of employment-related claims can meaningfully be distinguished from these admittedly permissible objectives. Each involves, at bottom, a *quid pro quo* between the plan sponsor and the participant: that is, the employer promises to pay increased benefits in exchange for the performance of some condition by the employee. By Spink's admission, the employer can ask the employee to continue to work for the employer, to cross a picket line, or to retire early. The execution of a release of claims against the employer is functionally no different; like these other conditions, it is an act that the employee performs for the employer in return for benefits. Certainly, there is no basis in §406(a)(1)(D) for distinguishing a valid from an invalid *quid pro quo.* Section 406(a)(1)(D) simply does not address what an employer can and cannot ask an employee to do in return for benefits. See generally *Alessi* v. *Raybestos-Manhattan, Inc.,* 451 U. S., at 511 (ERISA "leaves th[e] question" of the content of benefits "to the private parties creating the plan. . . . [T]he private parties, not the Government, control the level of benefits").[6] Furthermore, if an employer can avoid litigation that might result from laying off an employee by enticing him to retire early, as Spink concedes, it stands to reason that the employer can also protect itself from suits arising out of that retirement by asking the employee to release any employment-related claims he may have.[7]

---

[6] Indeed, federal law expressly approves the use of early retirement incentives conditioned upon the release of claims. The Older Workers Benefit Protection Act, Pub. L. 101–433, 104 Stat. 983 (1990), establishes requirements for the enforceability of employee waivers of ADEA claims made in exchange for early retirement benefits. See 29 U. S. C. §626(f). Of course, the enforceability of a particular waiver under this and other applicable laws, including state law, is a separate issue from the question whether such an arrangement violates ERISA's prohibited transaction rules. But absent clearer indication than what we have in §406(a)(1)(D), we would be reluctant to infer that ERISA bars conduct affirmatively sanctioned by other federal statutes.

In short, whatever the precise boundaries of the prohibition in § 406(a)(1)(D), there is one use of plan assets that it cannot logically encompass: a *quid pro quo* between the employer and plan participants in which the plan pays out benefits to the participants pursuant to its terms. When § 406(a)(1)(D) is read in the context of the other prohibited transaction provisions, it becomes clear that the payment of benefits in exchange for the performance of some condition by the employee is not a "transaction" within the meaning of § 406(a)(1). A standard that allows some benefits agreements but not others, as Spink suggests, lacks a basis in § 406(a)(1)(D); it also would provide little guidance to lower courts and those who must comply with ERISA. We thus hold that the payment of benefits pursuant to an amended plan, regardless of what the plan requires of the employee in return for those benefits, does not constitute a prohibited transaction.[8]

---

[7] Spink's *amicus* the United States suggests that § 406(a)(1)(D) is not violated so long as the employer provides benefits as compensation for the employee's labor, not for other things such as a release of claims. See Brief for United States as *Amicus Curiae* 15–16. But the Government contradicts its own rule with the examples it gives of lawful plans. For instance, the Government recognizes that "[a]n employer may provide increased pension benefits as an incentive for early retirement." *Id.*, at 20. While retirement benefits themselves may be defined as deferred wages, an *increase* in retirement benefits as part of an early retirement plan does not compensate the employee so much for services rendered as for the distinct act of leaving the company sooner than planned. The standard offered by the Government is thus of little help in identifying transactions prohibited by § 406(a)(1)(D).

[8] If the benefits payment were merely a sham transaction, meant to disguise an otherwise unlawful transfer of assets to a party in interest, or involved a kickback scheme, that might present a different question from the one before us. Spink does not suggest that Lockheed's payment was a cover for an illegal scheme, only that payment of the benefits conditioned on the release was itself violative of § 406(a)(1)(D).

IV

Finally, we address whether §§ 9201 and 9202(a) of OBRA, which amended respectively the ADEA and ERISA to prohibit age-based benefit accrual rules, apply retroactively.[9] Two Terms ago, we set forth the proper approach for determining the retroactive effect of a statute in *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994). We stated that "[w]hen a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.*, at 280. Thus, we must determine whether Congress has plainly delineated the temporal scope of the OBRA amendments to ERISA and the ADEA.

Section 9204(a)(1) of OBRA, 100 Stat. 1979, expressly provides that "[t]he amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply." 29 U. S. C. § 623 note. This language compels the conclusion that the amendments are prospective. For plan years that began on or after January 1, 1988, age-based accrual rules are unlawful under the amendments; further, only employees who have one hour of service in such a plan year are entitled to the protection of the amendments. But for plan years prior to the effective date, employers cannot be held liable for using age-based accrual rules. Where, as here, the temporal effect of a statute is manifest on its face, "there is no need to resort to judicial default rules," *Land-*

---

[9] Section 9203(a)(1) of OBRA, amending ERISA to prevent the exclusion of employees of a certain age from plan participation, applies "only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date." OBRA § 9204(b), 100 Stat. 1980. The Court of Appeals acknowledged that Lockheed fully complied with that amendment by admitting Spink as a member of the Plan as of December 25, 1988, the first day of Lockheed's 1988 plan year.

graf v. *USI Film Products, supra,* at 280, and inquiry is at an end.

Notwithstanding the clarity of § 9204(a)(1), the Court of Appeals believed that the text of §§ 9201 and 9202(a) require retroactive application of the benefit accrual rules. To deny an employee credit for service years during which he was excluded from the plan based on age, even though that exclusion was lawful at the time, the Court of Appeals reasoned, is to reduce the rate of benefits accrual for that employee.[10] 60 F. 3d, at 620. When Congress includes a provision that specifically addresses the temporal effect of a statute, that provision trumps any general inferences that might be drawn from the substantive provisions of the statute. See generally *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 384 (1992); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 228–229 (1957). Even if it were proper to disregard the express time limitations in § 9204(a)(1) in favor of more general language, §§ 9201 and 9202(a) cannot bear the weight of the Court of Appeals' construction. A reduction in total benefits due is not the same thing as a reduction in the rate of benefit accrual; the former is the final outcome of the calculation, whereas the latter is one of the factors in the equation.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

---

[10] See 29 U. S. C. § 1054(b)(1)(H)(i) (OBRA § 9202(a)) (defined benefit plan violates ERISA's benefit accrual requirements "if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age"); § 623(i)(1)(A) (OBRA § 9201) (prohibiting employers from establishing or maintaining a defined benefit plan that "requires or permits . . . the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual").

JUSTICE BREYER, with whom JUSTICE SOUTER joins, concurring in part and dissenting in part.

I join the Court's opinion except for its conclusion in Part III–B that "the payment of benefits pursuant to an amended plan, regardless of what the plan requires of the employee in return for those benefits, does not constitute a prohibited transaction." *Ante,* at 895. The legal question addressed in Part III–B is a difficult one, which we need not here answer and which would benefit from further development in the lower courts, where interested parties who are experienced in these highly technical, important matters could present their views. Accordingly, I would follow the suggestion of the Solicitor General that the Court not reach the issue in this case.

SHAW ET AL. *v.* HUNT, GOVERNOR OF NORTH CAROLINA, ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

No. 94–923. Argued December 5, 1995—Decided June 13, 1996*

Earlier in this suit, in *Shaw* v. *Reno*, 509 U. S. 630, this Court held that appellants, whose complaint alleged that North Carolina had deliberately segregated voters by race when it created two bizarre-looking majority-black congressional districts, Districts 1 and 12, had stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment. The Court remanded for further consideration by the District Court, which held that, although the North Carolina redistricting plan did classify voters by race, the classification survived strict scrutiny, and therefore was constitutional, because it was narrowly tailored to further the State's compelling interests in complying with §§2 and 5 of the Voting Rights Act of 1965.

Held:

1. Only the two appellants who live in District 12 have standing to continue this lawsuit, and only with respect to that district. The remaining appellants, who do not reside in either of the challenged districts and have not provided specific evidence that they personally were assigned to their voting districts on the basis of race, lack standing. See *United States* v. *Hays*, 515 U. S. 737. P. 904.

2. The North Carolina plan violates the Equal Protection Clause because the State's reapportionment scheme is not narrowly tailored to serve a compelling state interest. Pp. 904–918.

(a) Strict scrutiny applies when race is the "predominant" consideration in drawing district lines such that "the legislature subordinates race-neutral districting principles . . . to racial considerations." *Miller* v. *Johnson*, 515 U. S. 900, 916. The District Court's finding that the North Carolina General Assembly "deliberately drew" District 12 so that it would have an effective voting majority of black citizens, when read in the light of the evidence as to the district's shape and demographics and the legislature's objective, comports with the *Miller* standard. In order to justify its redistricting plan, therefore, the State must show not only that the plan was in pursuit of a compel-

---

*Together with No. 94–924, *Pope et al.* v. *Hunt, Governor of North Carolina, et al.*, also on appeal from the same court.

ling state interest, but also that it was narrowly tailored to achieve that interest. *Id.*, at 920. Pp. 904–908.

(b) None of the three separate "compelling interests" to which appellees point suffices to sustain District 12. First, the District Court found that the State's claimed interest in eradicating the effects of past discrimination did not actually precipitate the use of race in the redistricting plan, and the record does not establish that that finding was clearly erroneous. Second, the asserted interest in complying with §5 of the Voting Rights Act did not justify redistricting here, since creating an additional majority-black district, as urged by the Justice Department before it granted preclearance, was not required under a correct reading of §5. See *Miller*, 515 U. S., at 921. This Court again rejects the Department's expansive reading of §5 and of its own authority thereunder as requiring States to maximize the number of majority-minority districts wherever possible. See, *e. g.*, *id.*, at 925. Third, District 12, as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding liability under §2 of the Act, which, *inter alia*, prohibits dilution of the voting strength of members of a minority group. District 12 could not remedy any potential §2 violation, since the minority group must be shown to be "geographically compact" to establish §2 liability, see, *e. g.*, *Thornburg* v. *Gingles*, 478 U. S. 30, 50, and it cannot reasonably be suggested that District 12 contains a "geographically compact" population of any race. Appellees are singularly unpersuasive when they argue that a majority-minority district may be drawn anywhere if there is a strong basis in evidence for concluding that a §2 violation exists somewhere in the State. A district so drawn could not avoid §2 liability, which targets vote-dilution injury to individuals in a particular area, not to the minority as a group. Just as in *Miller*, this Court does not here reach the question whether compliance with the Act, on its own, can be a compelling state interest under the proper circumstances. Pp. 908–918.

861 F. Supp. 408, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined as to Parts II, III, IV, and V, *post*, p. 918. SOUTER, J., filed a dissenting statement, in which GINSBURG and BREYER, JJ., joined, *post*, p. 951.

Robinson O. Everett argued the cause and filed briefs for appellants in No. 94–923.

Thomas A. Farr argued the cause and filed briefs for appellants in No. 94–924. With him on the briefs were *Thomas F. Ellis, James C. Dever III,* and *Craig D. Mills.*

Edwin M. Speas, Jr., Senior Deputy Attorney General of North Carolina, argued the cause for appellees Hunt et al. in both cases. With him on the brief for state appellees were *Michael F. Easley,* Attorney General, and *Tiare B. Smiley,* Special Deputy Attorney General. *Julius L. Chambers* argued the cause for appellees Gingles et al. in both cases. With him on the brief were *Anita S. Hodgkiss, Adam Stein, James E. Ferguson II, Elaine R. Jones, Theodore M. Shaw, Norman J. Chachkin,* and *Jacqueline A. Berrien.*

Deputy Solicitor General Bender argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days, Assistant Attorney General Patrick, Beth S. Brinkmann, Steven H. Rosenbaum,* and *Miriam R. Eisenstein.*†

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This suit is here for a second time. In *Shaw* v. *Reno,* 509 U. S. 630 (1993) *(Shaw I),* we held that plaintiffs whose complaint alleged that the deliberate segregation of voters into separate and bizarre-looking districts on the basis of race stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment. We remanded the case for further consideration by the District Court. That court held that the North Carolina redistricting plan did classify voters by race, but that the classification survived strict scrutiny and therefore did not offend the Constitution. We now hold that the North Carolina plan does violate the Equal Protection Clause because the State's reapportionment scheme is not narrowly tailored to serve a compelling state interest.

---

†*Anthony T. Caso* and *Deborah J. La Fetra* filed a brief for the Pacific Legal Foundation urging reversal.

Briefs of *amicus curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Laughlin McDonald, Neil Bradley, Steven R. Shapiro, Paul C. Saunders, Herbert J. Hansell, Barbara R. Arnwine, Thomas J. Henderson,* and *Brenda Wright;* and for the North Carolina Legislative Black Caucus et al. by *Pamela S. Karlan* and *Eben Moglen.*

A. Leon Higginbotham, Jr., filed a brief for the Congressional Black Caucus as *amicus curiae.*

The facts are set out in detail in our prior opinion, and we shall only summarize them here. After the 1990 census, North Carolina's congressional delegation increased from 11 to 12 members. The State General Assembly adopted a reapportionment plan, Chapter 601, that included one majority-black district, District 1, located in the northeastern region of the State. 1991 N. C. Sess. Laws, ch. 601. The legislature then submitted the plan to the Attorney General of the United States for preclearance under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c (1988 ed.). The Assistant Attorney General for Civil Rights, acting on the Attorney General's behalf, objected to the proposed plan because it failed "to give effect to black and Native American voting strength" in "the south-central to southeastern part of the state" and opined that the State's reasons for not creating a second majority-minority district appeared "to be pretextual." App. 151–153. Duly chastened, the legislature revised its districting scheme to include a second majority-black district. 1991 N. C. Extra Sess. Laws, ch. 7. The new plan, Chapter 7, located the minority district, District 12, in the north-central or Piedmont region, not in the south-central or southeastern region identified in the Justice Department's objection letter. The Attorney General nonetheless precleared the revised plan.

By anyone's measure, the boundary lines of Districts 1 and 12 are unconventional. A map portrays the districts' deviance far better than words, see the Appendix to the opinion of the Court in *Shaw I*, *supra*, but our prior opinion describes them as follows:

> "The first of the two majority-black districts . . . is somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southern-most part of the State near the South Carolina border. . . .
>
> "The second majority-black district, District 12, is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the [Interstate]-85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.'" *Shaw I, supra,* at 635–636 (citation omitted).

Five North Carolinians commenced the present action in the United States District Court for the Eastern District of North Carolina against various state officials.[1] Following our reversal of the District Court's dismissal of their complaint in *Shaw I,* the District Court allowed a number of individuals to intervene, 11 on behalf of the plaintiffs and 22 for the defendants. After a 6-day trial, the District Court unanimously found "that the Plan's lines were deliberately drawn to produce one or more districts of a certain racial composition." 861 F. Supp. 408, 417, 473–474 (1994). A majority of the court held that the plan was constitutional, nonetheless, because it was narrowly tailored to further the State's compelling interests in complying with §§2 and 5 of the Voting Rights Act, 42 U. S. C. §§1973, 1973c. 861 F. Supp., at 474. The dissenting judge disagreed with that portion of the judgment. We noted probable jurisdiction. 515 U. S. 1172 (1995).

---

[1] The complaint also named the Attorney General of the United States and the Assistant Attorney General for the Civil Rights Division as defendants. The District Court granted the federal officials' motion to dismiss, *Shaw* v. *Barr,* 808 F. Supp. 461 (EDNC 1992).

As a preliminary matter, appellees challenge appellants' standing to continue this lawsuit. In *United States* v. *Hays*, 515 U. S. 737 (1995), we recognized that a plaintiff who resides in a district which is the subject of a racial-gerrymander claim has standing to challenge the legislation which created that district, but that a plaintiff from outside that district lacks standing absent specific evidence that he personally has been subjected to a racial classification. Two appellants, Ruth Shaw and Melvin Shimm, live in District 12 and thus have standing to challenge that part of Chapter 7 which defines District 12. See *Miller* v. *Johnson*, 515 U. S. 900, 909 (1995). The remaining appellants do not reside in District 1, however, and they have not provided specific evidence that they personally were assigned to their voting districts on the basis of race. Therefore, we conclude that only Shaw and Shimm have standing and only with respect to District 12.[2]

We explained in *Miller* v. *Johnson* that a racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect. *Id.*, at 904–905; see also *Shaw I*, 509 U. S., at 657; *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200 (1995). This is true whether or not the reason for the racial classification is benign or the purpose remedial. *Shaw I, supra,* at 642–643, 653; *Adarand, supra,* at 228–229. Applying traditional equal protection principles in the voting-rights context is "a most delicate task," *Miller, supra,* at 905, however, because a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts. *Shaw I, supra,* at 645–646; *Miller,* 515 U. S., at 916. The constitutional wrong occurs when race becomes the "dominant and controlling" consideration. *Id.,* at 911, 915–916.

---

[2] JUSTICE STEVENS would dismiss the complaint for a lack of standing. *Post*, at 921–923. Here, as in other places in his dissent, JUSTICE STEVENS' disagreement is more with the Court's prior decisions in *Shaw I*, 509 U. S. 630 (1993), *United States* v. *Hays*, 515 U. S. 737 (1995), and *Miller* v. *Johnson*, 515 U. S. 900 (1995), than with this decision. JUSTICE STEVENS challenged the Court's standing analysis and its finding of cognizable injury in both *Hays*, *supra*, at 751 (STEVENS, J., concurring in judgment), and *Miller*, *supra*, at 929–931 (STEVENS, J., dissenting), and both Justice White and JUSTICE SOUTER advanced many of the same arguments in *Shaw I*. See *Shaw I*, 509 U. S., at 659–674 (White, J., dissenting); *id.*, at 680–687, and n. 9 (SOUTER, J., dissenting). Their position has been repeatedly rejected by the Court. See *id.*, at 644–652; *Miller*, *supra*, at 909; and *Hays*, *supra*, at 744–745.

The plaintiff bears the burden of proving the race-based motive and may do so either through "circumstantial evidence of a district's shape and demographics" or through "more direct evidence going to legislative purpose." *Id.,* at 916. After a detailed account of the process that led to enactment of the challenged plan, the District Court found that the General Assembly of North Carolina "deliberately drew" District 12 so that it would have an effective voting majority of black citizens. 861 F. Supp., at 473.

Appellees urge upon us their view that this finding is not phrased in the same language that we used in our opinion in *Miller* v. *Johnson, supra,* where we said that a plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.,* at 916. The District Court, of course, did not have the benefit of our opinion in *Miller* at the time it wrote its opinion. While it would have been preferable for the court to have analyzed the case in terms of the standard laid down in *Miller,* that was not possible. This circumstance has no consequence here because we think that the District Court's findings, read in the light of the evidence that it had before it, comport with the *Miller* standard.

First, the District Court had evidence of the district's shape and demographics. The court observed "the obvious fact" that the district's shape is "highly irregular and geographically non-compact by any objective standard that can be conceived." 861 F. Supp., at 469. In fact, the serpentine district has been dubbed the least geographically compact district in the Nation. App. 332.

The District Court also had direct evidence of the legislature's objective. The State's submission for preclearance expressly acknowledged that Chapter 7's "*overriding* purpose was to comply with the dictates of the Attorney General's December 18, 1991 letter and to create two congressional districts with effective black voting majorities." App. 162 (emphasis added). This admission was confirmed by Gerry Cohen, the plan's principal draftsman, who testified that creating two majority-black districts was the "principal reason" for Districts 1 and 12. *Id.*, at 675; Tr. 514. Indeed, appellees in their first appearance before the District Court "formally concede[d] that the state legislature deliberately created the two districts in a way to assure black-voter majorities," *Shaw* v. *Barr*, 808 F. Supp. 461, 470 (EDNC 1992), and that concession again was credited by the District Court on remand, 861 F. Supp., at 473–474. See also *Shaw I, supra,* at 666 (White, J., dissenting) ("The State has made no mystery of its intent, which was to respond to the Attorney General's objections by improving the minority group's prospects of electing a candidate of its choice" (citation omitted)). Here, as in *Miller*, "we fail to see how the District Court could have reached any conclusion other than that race was the predominant factor in drawing [the challenged district]." *Miller, supra,* at 918.

In his dissent, JUSTICE STEVENS argues that strict scrutiny does not apply where a State "respects" or "compl[ies] with traditional districting principles." *Post,* at 931–932 ("[R]ace-based districting which respects traditional districting principles does not give rise to constitutional suspicion"), *post,* at 932 ("*Miller* demonstrates that although States may avoid strict scrutiny by complying with traditional districting principles . . . "). That, however, is not the standard announced and applied in *Miller*,[3] where we held that strict scrutiny applies when race is the "predominant" consideration in drawing the district lines such that "the legislature subordinate[s] traditional race-neutral districting principles . . . to racial considerations." *Miller, supra,* at 916. (JUSTICE STEVENS articulates the correct standard in his dissent, *post,* at 930, but he fails to properly apply it.) The *Miller* standard is quite different from the one that JUSTICE STEVENS advances, as an examination of the dissent's reasoning demonstrates. The dissent explains that "two race-neutral, traditional districting criteria" were at work in determining the shape and placement of District 12, and from this suggests that strict scrutiny should not apply. *Post,* at 936–939. We do not quarrel with the dissent's claims that, in shaping District 12, the State effectuated its interest in creating one rural and one urban district, and that partisan politicking was actively at work in the districting process. That the legislature addressed these interests does not in any way refute the fact that race was the legislature's predominant consideration. Race was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made.

Racial classifications are antithetical to the Fourteenth Amendment, whose "central purpose" was "to eliminate racial discrimination emanating from official sources in the States." *McLaughlin* v. *Florida,* 379 U. S. 184, 192 (1964);

---

[3] JUSTICE STEVENS in dissent incorrectly reads *Miller* as demonstrating that "although States may avoid strict scrutiny by complying with traditional districting principles, they may not do so by proffering pretextual, race-neutral explanations." *Post,* at 932. *Miller* plainly states that although "compliance with 'traditional districting principles such as compactness, contiguity, and respect for political subdivisions' may well suffice to refute a claim of racial gerrymandering," a State cannot make such a refutation where "those factors *were subordinated to racial objectives.*" *Miller,* 515 U. S., at 919 (citation omitted) (emphasis added).

Richmond v. *J. A. Croson Co.*, 488 U. S. 469, 491 (1989) (opinion of O'CONNOR, J.) ("[T]he Framers of the Fourteenth Amendment . . . desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations"). While appreciating that a racial classification causes "fundamental injury" to the "individual rights of a person," *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 661 (1987), we have recognized that, under certain circumstances, drawing racial distinctions is permissible where a governmental body is pursuing a "compelling state interest." A State, however, is constrained in how it may pursue that end: "[T]he means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 280 (1986) (opinion of Powell, J.). North Carolina, therefore, must show not only that its redistricting plan was in pursuit of a compelling state interest, but also that "its districting legislation is narrowly tailored to achieve [that] compelling interest." *Miller*, 515 U. S., at 920.

Appellees point to three separate compelling interests to sustain District 12: to eradicate the effects of past and present discrimination; to comply with §5 of the Voting Rights Act; and to comply with §2 of that Act. We address each in turn.[4]

---

[4] JUSTICE STEVENS in dissent discerns three reasons that he believes "may have motivated" the legislators to favor the creation of the two minority districts and that he believes together amount to a compelling state interest. *Post*, at 941. As we explain below, a racial classification cannot withstand strict scrutiny based upon speculation about what "may have motivated" the legislature. To be a compelling interest, the State must show that the alleged objective was the legislature's "actual purpose" for the discriminatory classification, see *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 730, and n. 16 (1982), and the legislature must have had a strong basis in evidence to support that justification before it implements the classification. See *infra*, at 910. Even if the proper factual basis existed, we believe that the three reasons JUSTICE STEVENS prof-

A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions. *Croson*, 488 U. S., at 498–506. For that interest to rise to the level of a compelling state interest, it must satisfy two conditions. First, the discrimination must be "'identified discrimination.'" *Id.*, at 499, 500, 505, 507, 509. "While the States and their subdivisions may take remedial action when they possess evidence" of past or present discrimination, "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Id.*, at 504. A generalized assertion of past discrimination in a particular industry or region is not adequate because it "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.*, at 498 (opinion of O'CONNOR, J.). Accordingly, an effort to alleviate the

---

fers, separately or combined, would not amount to a compelling interest. First, the dissent seems to acknowledge that its initial reason—the "sorry history of race relations in North Carolina," *post*, at 941—did not itself drive the decision to create the minority districts, presumably for the reasons we discuss *infra*, at 910. The dissent contends next that an "acceptable reason for creating a second majority-minority district" was the "State's interest in avoiding the litigation that would have been necessary to overcome the Attorney General's objection" under § 5. *Post*, at 942. If this were true, however, *Miller* v. *Johnson* would have been wrongly decided because there the Court rejected the contention that complying with the Justice Department's preclearance objection could be a compelling interest. *Miller*, *supra*, at 921–922. It necessarily follows that avoiding the litigation required to overcome the Department's objection could not be a compelling interest. The dissent's final reason—"the interest in avoiding the expense and unpleasantness of [§ 2] litigation" "regardless of the possible outcome of [that] litigation," *post*, at 943—sweeps too broadly. We assume, *arguendo*, that a State may have a compelling interest in complying with the properly interpreted Voting Rights Act. *Infra*, at 915. But a State must also have a "strong basis in evidence," see *Shaw I*, 509 U. S., at 656 (quoting *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 500 (1989)), for believing that it is violating the Act. It has no such interest in avoiding meritless lawsuits.

effects of societal discrimination is not a compelling interest. *Wygant, supra,* at 274–275, 276, 288.[5] Second, the institution that makes the racial distinction must have had a "strong basis in evidence" to conclude that remedial action was necessary, "*before* it embarks on an affirmative-action program," 476 U. S., at 277 (plurality opinion) (emphasis added).

In this suit, the District Court found that an interest in ameliorating past discrimination did not actually precipitate the use of race in the redistricting plan. While some legislators invoked the State's history of discrimination as an argument for creating a second majority-black district, the court found that these members did not have enough voting power to have caused the creation of the second district on that basis alone. 861 F. Supp., at 471.

Appellees, to support their claim that the plan was drawn to remedy past discrimination, rely on passages from two reports prepared for this litigation by a historian and a social scientist. Brief for Appellees Gingles et al. 40–44, citing H. Watson, Race and Politics in North Carolina, 1865–1994, App. 610–624 (excerpts), and J. Kousser, After 120 Years: Redistricting and Racial Discrimination in North Carolina, *id.*, at 602–609 (excerpts). Obviously these reports, both dated March 1994, were not before the General Assembly when it enacted Chapter 7. And there is little to suggest that the legislature considered the historical events and social-science data that the reports recount, beyond what individual members may have recalled from personal experience. We certainly cannot say on the basis of these reports that the District Court's findings on this point were clearly erroneous.

---

[5] For examples of this limitation in application see *Wygant,* 476 U. S., at 274–276 (where a plurality of the Court concluded that remedying societal discrimination and promoting role models for students was not a compelling interest); *Richmond* v. *J. A. Croson Co., supra,* at 498–506.

Appellees devote most of their efforts to arguing that the race-based redistricting was constitutionally justified by the State's duty to comply with the Voting Rights Act. The District Court agreed and held that compliance with §§ 2 and 5 of the Act could be, and in this suit was, a compelling state interest. 861 F. Supp., at 437. In *Miller*, we expressly left open the question whether under the proper circumstances compliance with the Voting Rights Act, on its own, could be a compelling interest. *Miller*, 515 U. S., at 921 ("[w]hether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination . . ."). Here once again we do not reach that question because we find that creating an additional majority-black district was not required under a correct reading of § 5 and that District 12, as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding § 2 liability.

With respect to § 5 of the Voting Rights Act, we believe our decision in *Miller* forecloses the argument, adopted by the District Court, that failure to engage in the race-based districting would have violated that section. In *Miller*, we considered an equal protection challenge to Georgia's Eleventh Congressional District. As appellees do here, Georgia contended that its redistricting plan was necessary to meet the Justice Department's preclearance demands. The Justice Department had interposed an objection to a prior plan that created only two majority-minority districts. We held that the challenged congressional plan was not required by a correct reading of § 5 and therefore compliance with that law could not justify race-based districting. *Id.*, at 921 ("[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws").

We believe the same conclusion must be drawn here. North Carolina's first plan, Chapter 601, indisputably was ameliorative, having created the first majority-black district in recent history. Thus, that plan, "'even if [it] fall[s] short of what might be accomplished in terms of increasing minority representation,'" "'cannot violate §5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.'" *Id.*, at 924, quoting Days, Section 5 and the Role of the Justice Department, in B. Grofman & C. Davidson, Controversies in Minority Voting 56 (1992), and *Beer* v. *United States*, 425 U. S. 130, 141 (1976).

As in *Miller*, the United States relies on the purpose prong of §5 to explain the Department's preclearance objections, alleging that North Carolina, for pretextual reasons, did not create a second majority-minority district. Brief for United States as *Amicus Curiae* 24. We again find the Government's position "insupportable." *Miller*, *supra*, at 924. The General Assembly, in its submission filed with Chapter 601, explained why it did not create a second minority district; among its goals were "to keep precincts whole, to avoid dividing counties into more than two districts, and to give black voters a fair amount of influence by creating at least one district that was majority black in voter registration and by creating a substantial number of other districts in which black voters would exercise a significant influence over the choice of congressmen." App. 142. The submission also explained in detail the disadvantages of other proposed plans. See, *e. g.*, *id.*, at 139, 140, 143 (Balmer Congress 6.2 Plan's "[s]econd 'minority' district did not have effective minority voting majority" because it "depended on the cohesion of black and Native American voters, and no such pattern was evident" and "this plan dramatically decreased black influence" in four other districts). A memorandum, sent to the Department of Justice on behalf of the legislators in charge of the redistricting process, provided still further reasons for the State's decision not to draw two minority districts as urged by various interested parties. App. 94–138; 861 F. Supp., at 480–481, n. 9 (Voorhees, C. J., dissenting). We have recognized that a "State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the Constitution,' and thus cannot provide any basis under § 5 for the Justice Department's objection." *Miller, supra,* at 924 (citations omitted).

It appears that the Justice Department was pursuing in North Carolina the same policy of maximizing the number of majority-black districts that it pursued in Georgia. See *Miller, supra,* at 924–925, and n. The two States underwent the preclearance processes during the same time period and the objection letters they received from the Civil Rights Division were substantially alike. App. in *Miller* v. *Johnson,* O. T. 1994, No. 94–631, pp. 99–107. A North Carolina legislator recalled being told by the Assistant Attorney General that "you have twenty-two percent black people in this State, you must have as close to twenty-two percent black Congressmen, or black Congressional Districts in this State." App. 201. See also Deposition of Senator Dennis Winner, *id.,* at 698. We explained in *Miller* that this maximization policy is not properly grounded in § 5 and the Department's authority thereunder. 515 U. S., at 925 ("In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld"). We again reject the Department's expansive interpretation of § 5. *Id.,* at 926–927. Cf. *Johnson* v. *De Grandy,* 512 U. S. 997, 1017 (1994) ("Failure to maximize cannot be the measure of § 2").[6]

---

[6] The United States attempts to distinguish this suit from *Miller* by relying on the District Court's finding that North Carolina conducted "its own independent reassessment" of Chapter 601 and found "the Department's objection was legally and factually supportable." Brief for

With respect to § 2, appellees contend, and the District Court found, that failure to enact a plan with a second majority-black district would have left the State vulnerable to a lawsuit under this section. Our precedent establishes that a plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population. *Id.*, at 1007. To prevail on such a claim, a plaintiff must prove that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; that the minority group "is politically cohesive"; and that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg* v. *Gingles*, 478 U. S. 30, 50–51 (1986); *Growe* v. *Emison*, 507 U. S. 25 (1993) (recognizing that the three *Gingles* preconditions would apply to a § 2 challenge to a single-member district). A court must also consider all other relevant circumstances and must ultimately find based on the totality of those circumstances that members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b). See *De Grandy*, *supra*, at 1010–1012.

United States as *Amicus Curiae* 25; 861 F. Supp. 408, 474 (1994) (case below). The "reassessment" was the legislature's determination that it may be susceptible to a § 2 challenge. *Id.*, at 464–465. Even if the General Assembly properly reached that conclusion, we doubt that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory purpose under § 5. Even if discriminatory purpose could be shown, the means of avoiding such a violation could be race neutral, and so we also doubt that the prospect of violating the purpose prong of § 5 could justify a race-based redistricting plan such as the one implemented by North Carolina.

We assume, *arguendo,* for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest, and we likewise assume, *arguendo,* that the General Assembly believed a second majority-minority district was needed in order not to violate § 2, and that the legislature at the time it acted had a strong basis in evidence to support that conclusion. We hold that even with the benefit of these assumptions, the North Carolina plan does not survive strict scrutiny because the remedy—the creation of District 12—is not narrowly tailored to the asserted end.

Although we have not always provided precise guidance on how closely the means (the racial classification) must serve the end (the justification or compelling interest), we have always expected that the legislative action would substantially address, if not achieve, the avowed purpose. See *Miller, supra,* at 922 ("[T]he judiciary retains an independent obligation . . . to ensure that the State's actions are narrowly tailored to achieve a compelling interest"); *Wygant,* 476 U. S., at 280 (opinion of Powell, J.) ("[T]he means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose") *id.,* at 278, n. 5 (opinion of Powell, J.) (race-based state action must be remedial); *Shaw I,* 509 U. S., at 655 ("A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression"). Cf. *Missouri* v. *Jenkins,* 515 U. S. 70, 88 (1995) (With regard to the remedial authority of a federal court: "'The remedy must . . . be related to "the *condition* alleged to offend the Constitution . . . ."'" and must be "'*remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct"'") (quoting *Milliken* v. *Bradley,* 433 U. S. 267, 280–281 (1977), in turn quoting *Milliken* v. *Bradley,* 418 U. S. 717, 738, 746 (1974)). Where, as here, we assume avoidance of § 2 liability to be a compelling state interest, we think that the racial classification would have to realize that goal; the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored.[7]

District 12 could not remedy any potential § 2 violation. As discussed above, a plaintiff must show that the minority group is "geographically compact" to establish § 2 liability. No one looking at District 12 could reasonably suggest that the district contains a "geographically compact" population of any race. See 861 F. Supp., at 469. Therefore where that district sits, "there neither has been a wrong nor can be a remedy." *Growe, supra,* at 41 (footnote omitted).[8]

Appellees do not defend District 12 by arguing that the district is geographically compact, however. Rather they contend, and a majority of the District Court agreed, 861 F. Supp., at 454–455, n. 50, that once a legislature has a strong basis in evidence for concluding that a § 2 violation exists in the State, it may draw a majority-minority district anywhere, even if the district is in no way coincident with the compact *Gingles* district, as long as racially polarized voting exists where the district is ultimately drawn. Tr. of Oral Arg. 50–51, 54–56.

---

[7] We do not suggest that where the governmental interest is eradicating the effects of past discrimination the race-based action necessarily would have to achieve fully its task to be narrowly tailored.

[8] JUSTICE STEVENS in dissent argues that it does not matter that District 12 could not possibly remedy a § 2 violation because he believes the State's plan would avoid § 2 liability. *Post,* at 946–947. As support, JUSTICE STEVENS relies on our decision in *Johnson* v. *De Grandy,* 512 U. S. 997 (1994), which he reads to say that "a plaintiff cannot make out a prima facie case of vote dilution under § 2 unless he can demonstrate that his proposed plan contains *more* majority-minority districts than the State's." *Post,* at 946 (citing *De Grandy, supra,* at 1008). The dissent's reading is flawed by its omission. In *De Grandy,* we presumed that the minority districts drawn in the State's plan were lawfully drawn and, indeed, we expressly stated that a vote-dilution claim under § 2 "requires the possibility of creating more *than the existing number of reasonably compact districts* with a sufficiently large minority population to elect candidates of its choice." *De Grandy, supra,* at 1008 (emphasis added).

We find this position singularly unpersuasive. We do not see how a district so drawn would avoid § 2 liability. If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b). The vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State. For example, if a geographically compact, cohesive minority population lives in south-central to southeastern North Carolina, as the Justice Department's objection letter suggested, District 12 that spans the Piedmont Crescent would not address that § 2 violation. The black voters of the south-central to southeastern region would still be suffering precisely the same injury that they suffered before District 12 was drawn. District 12 would not address the professed interest of relieving the vote dilution, much less be narrowly tailored to accomplish the goal.

Arguing, as appellees do and the District Court did, that the State may draw the district anywhere derives from a misconception of the vote-dilution claim. To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not. See § 1973 ("the right of any citizen").[9]

---

[9] This does not mean that a § 2 plaintiff has the right to be placed in a majority-minority district once a violation of the statute is shown. States retain broad discretion in drawing districts to comply with the mandate of § 2. *Voinovich* v. *Quilter*, 507 U. S. 146, 156–157 (1993); *Growe* v. *Emison*, 507 U. S. 25, 32–37 (1993).

The United States submits that District 12 does, in fact, incorporate a "substantial portio[n]" of the concentration of minority voters that would have given rise to a §2 claim. Brief for United States as *Amicus Curiae* 27. Specifically, the Government claims that "District 12 . . . contains the heavy concentration of African Americans in Mecklenburg County, the same urban component included in the second minority opportunity district in some of the alternative plans." *Ibid.* The portion of District 12 that lies in Mecklenburg County covers not more than 20% of the district. See Exhibit 301 of Plaintiff-Intervenors, Map A, Map 9B. We do not think that this degree of incorporation could mean that District 12 substantially addresses the §2 violation. We hold, therefore, that District 12 is not narrowly tailored to the State's asserted interest in complying with §2 of the Voting Rights Act.

For the foregoing reasons, the judgment of the District Court is

Reversed.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join as to Parts II–V, dissenting.

As I have explained on prior occasions, I am convinced that the Court's aggressive supervision of state action designed to accommodate the political concerns of historically disadvantaged minority groups is seriously misguided. A majority's attempt to enable the minority to participate more effectively in the process of democratic government should not be viewed with the same hostility that is appropriate for oppressive and exclusionary abuses of political power. See, *e. g., Adarand Constructors, Inc.* v. *Peña,* 515 U. S. 200, 243–249 (1995) (STEVENS, J., dissenting); *Miller* v. *Johnson,* 515 U. S. 900, 931–933 (1995) (STEVENS, J., dissenting); *Shaw* v. *Reno,* 509 U. S. 630, 634–635 (1993) *(Shaw I)* (STEVENS, J., dissenting); *Wygant* v. *Jackson Bd. of Ed.,* 476 U. S. 267, 316–317 (1986) (STEVENS, J., dissenting); *Cousins* v. *City Council* *of Chicago*, 466 F. 2d 830, 852 (CA7 1972) (Stevens, J., dissenting). But even if we accept the Court's refusal to recognize any distinction between two vastly different kinds of situations, we should affirm the judgment of the District Court in this case.

As the Court analyzes the case, it raises three distinct questions: (1) Should North Carolina's decision to create two congressional districts in which a majority of the voters are African-American be subject to strict constitutional scrutiny?; (2) If so, did North Carolina have a compelling interest in creating such districts?; and (3) If so, was the creation of those districts "narrowly tailored" to further the asserted compelling interest? The Court inadequately explains its answer to the first question, and it avoids answering the second because it concludes that its answer to the third disposes of the case. In my estimation, the Court's disposition of all three questions is most unsatisfactory.

After commenting on the majority's treatment of the threshold jurisdictional issue, I shall discuss separately the three questions outlined above. In doing so, I do not mean to imply that I endorse the majority's effort to apply in rigid fashion the strict scrutiny analysis developed for cases of a far different type. I mean only to show that, even on its own terms, the majority's analysis fails to convince.

I

I have explained previously why I believe that the Court has failed to supply a coherent theory of standing to justify its emerging and misguided race-based districting jurisprudence. See *Miller* v. *Johnson*, 515 U. S., at 929–931 (STEVENS, J., dissenting); *United States* v. *Hays*, 515 U. S. 737, 750–751 (1995) (STEVENS, J., concurring in judgment). The Court's analysis of the standing question in this case is similarly unsatisfactory, and, in my view, reflects the fact that the so-called *Shaw* claim seeks to employ the federal courts to impose a particular form of electoral process, rather than to redress any racially discriminatory treatment that the electoral process has imposed. In this instance, therefore, I shall consider the standing question in light of the majority's assertions about the nature of the underlying constitutional challenge.

I begin by noting that this case reveals the *Shaw* claim to be useful less as a tool for protecting against racial discrimination than as a means by which state residents may second-guess legislative districting in federal court for partisan ends. The plaintiff-intervenors in this case are Republicans. It is apparent from the record that their real grievance is that they are represented in Congress by Democrats when they would prefer to be represented by members of their own party. They do not suggest that the racial identity of their representatives is a matter of concern, but it is obvious that their political identity is critical. See *Pope* v. *Blue,* 809 F. Supp. 392 (WDNC 1992).

Significantly, from the outset of the legislative deliberations, the Republican Party did not oppose the creation of more than one majority-minority district. Indeed, several plans proposed by the Republicans in the state legislature provided two such districts. 861 F. Supp. 408, 460 (EDNC 1994). However, now that the State has created a district that is designed to preserve Democratic incumbents, and now that the plaintiff-intervenors' partisan gerrymandering suit has been dismissed for failure to state a claim, these intervenors have joined this racial gerrymandering challenge.

It is plain that these intervenors are using their allegations of impermissibly race-based districting to achieve the same substantive result that their previous, less emotionally charged partisan gerrymandering challenge failed to secure. In light of the amorphous nature of the race discrimination claim recognized in *Shaw I*, it is inevitable that allegations of racial gerrymandering will become a standard means by which unsuccessful majority-race candidates, and their parties, will seek to obtain judicially what they could not obtain electorally.

Even if the other plaintiffs to this litigation do object to the use of race in the districting process for reasons other than partisan political advantage, the majority fails to explain adequately the nature of their constitutional challenge, or why it should be cognizable under the Equal Protection Clause. Not surprisingly, therefore, the majority's explanation of why these plaintiffs have standing to bring this challenge is unconvincing.

It is important to point out what these plaintiffs do not claim. Counsel for appellees put the matter succinctly when he stated that this case is not *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).[1] There, the plaintiffs had been prohibited from voting in municipal elections; here, all voters remain free to select representatives to Congress. Thus, while the plaintiffs purport to be challenging an unconstitutional racial gerrymander, they do not claim that they have been shut out of the electoral process on account of race, or that their voting power has been diluted as a consequence of race-based districting. *Shaw I*, 509 U. S., at 641.

What then is the wrong that these plaintiffs have suffered that entitles them to call upon a federal court for redress? In *Shaw I*, the majority construed the plaintiffs' claim to be that the Equal Protection Clause forbids race-based districting designed solely to "separate" voters by race, and that North Carolina's districting process violated the prohibition. *Ibid.* Even if that were the claim before us, these plaintiffs should not have standing to bring it. The record shows that North Carolina's districting plan served to require these plaintiffs to *share* a district with voters of a different race. Thus, the injury that these plaintiffs have suffered, to the extent that there has been injury at all, stems from the integrative rather than the segregative effects of the State's redistricting plan.

---

[1] Tr. of Oral Arg. 58.

Perhaps cognizant of this incongruity, counsel for plaintiffs asserted a rather more abstract objection to race-based districting at oral argument. He suggested that the plaintiffs objected to the use of race in the districting process not because of any adverse consequence that these plaintiffs, on account of their race, had suffered more than other persons, but rather because the State's failure to obey a constitutional command to legislate in a color-blind manner conveyed a message to voters across the State that "there are two black districts and ten white districts."[2] Tr. of Oral Arg. 5.

Such a challenge calls to mind Justice Frankfurter's memorable characterization of the suit brought in *Colegrove* v. *Green*, 328 U. S. 549, 552 (1946). "This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens," he explained. "The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity." *Ibid.* Suits of this type necessarily press the boundaries of federal-court jurisdiction, if they do not surpass it. When a federal court is called upon, as it is here, to parse among varying legislative choices about the political structure of a State, and when the litigant's claim ultimately rests on "a difference of opinion as to the function of representative government" rather than a claim of discriminatory exclusion, *Baker* v. *Carr*, 369 U. S. 186, 333 (1962) (Harlan, J., dissenting), there is reason for pause. Cf. *Lujan* v. *Defenders of Wildlife,* 504 U. S. 555, 573–574 (1992).[3]

---

[2] Counsel went so far as to liken the State's districting plan to state-run water fountains that are available to citizens of all races but are nevertheless labeled "Black" and "White." He argued that the State's race-based redistricting map constituted an unlawful racial classification in the same way that the signs above the fountains would. Although neither racial classification would deprive any person of a tangible benefit—water from both fountains and effective political representation would remain equally available to persons of all races—each would be unconstitutional because of the very fact that the State had espoused a racial classification publicly. *Id.*, at 5–6.

Even if an objection to a State's decision to forgo colorblind districting is cognizable under some constitutional provision, I do not understand why that provision should be the Equal Protection Clause. In *Reynolds* v. *Sims,* 377 U. S. 533, 561 (1964), we were careful to point out that "[a] predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature." In addition, in *Palmer* v. *Thompson,* 403 U. S. 217, 225 (1971), we explained that racially motivated legislation violates the Equal Protection Clause only when the challenged legislation "affect[s] blacks differently from whites."

To be sure, as some commentators have noted, we have permitted generalized claims of harm resulting from state-sponsored messages to secure standing under the Establishment Clause. Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 499–524 (1993). It would be quite strange, however, to confer similarly broad standing under the Equal Protection Clause because that Clause protects against wrongs which by definition burden some persons but not others.

Here, of course, it appears that no individual has been burdened more than any other. The supposedly insidious messages that *Shaw I* contends will follow from extremely irregular race-based districting will presumably be received in equal measure by *all* state residents. For that reason, the claimed violation of a shared right to a color-blind districting process would not seem to implicate the Equal Protection Clause at all precisely because it rests neither on a challenge to the State's decision to distribute burdens and benefits unequally, nor on a claim that the State's formally equal treatment of its citizens in fact stamps persons of one race with a badge of inferiority. See *Bush* v. *Vera*, *post*, at 1052–1054 (SOUTER, J., dissenting).

---

[3] There, a majority of the Court stated that "[w]e have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan* v. *Defenders of Wildlife,* 504 U. S., at 573–574.

Indeed, to the extent that any person has been burdened more than any other by the State's districting plan, geography rather than race would seem to be to blame. The State has not chosen to subject only persons of a particular race to race-based districting. Rather, the State has selected certain geographical regions in which all voters—both white and black—have been assigned to race-based districts. Thus, what distinguishes those residents who have received a "color-blind" districting process from those who have not is geography rather than racial identity. Not surprisingly, therefore, *Shaw I* emphasizes that the race of the members of the plaintiff class is irrelevant. *Shaw I*, 509 U. S., at 641.

Given the absence of any showing, or, indeed, any allegation, that any person has been harmed more than any other *on account of race*, the Court's decision to entertain the claim of these plaintiffs would seem to emanate less from the Equal Protection Clause's bar against racial discrimination than from the Court's unarticulated recognition of a new substantive due process right to "color-blind" districting itself. See *id.*, at 641–642.[4] Revealed for what it is, the constitutional claim before us ultimately depends for its success on little more than speculative judicial suppositions about the societal message that is to be gleaned from race-based districting. I know of no workable constitutional principle, however, that can discern whether the message conveyed is a distressing endorsement of racial separatism, or an inspiring call to integrate the political process. As a result, I know of no basis for recognizing the right to color-blind districting that has been asserted here.

---

[4] The Court's decisions in *Powers* v. *Ohio*, 499 U. S. 400 (1991), and *Batson* v. *Kentucky*, 476 U. S. 79 (1986), are not to the contrary. There, we have held that defendants have third-party standing, no matter what their race, to assert the rights of jurors, who have been deprived because of their race of a benefit available to all others. No voter in this litigation

Even if there were some merit to the constitutional claim, it is at least clear that it requires the recognition of a new constitutional right. For that very reason, the Court's suggestion that pre-*Shaw*, race discrimination precedent somehow compels the application of strict scrutiny is disingenuous. The fact that our equal protection jurisprudence requires strict scrutiny of a claim that the State has used race as a criterion for imposing burdens on some persons but not others does not mean that the Constitution demands that a similar level of review obtain for a claim that the State has used race to impose equal burdens on the polity as a whole, or upon some nonracially defined portion thereof. As to the latter claim, the State may well deserve more deference when it determines that racial considerations are legitimate in a context that results in no race-based, unequal treatment.

To take but one example, I do not believe that it would make sense to apply strict scrutiny to the Federal Government's decision to require citizens to identify their race on census forms, even though that requirement would force citizens to classify themselves racially, and even though such a requirement would arguably convey an insidious message about the Government's continuing belief that race remains relevant to the formulation of public policy. Of course, if the Federal Government required only those persons residing in

---

has shown either that he has uniquely been denied an otherwise generally available benefit on account of race, or that anyone else has.

the Midwest to identify their race on the census form, I do not doubt that only persons living in States in that region who filled out the forms would have standing to bring the constitutional challenge. I do doubt, however, whether our equal protection jurisprudence would require a federal court to evaluate the claim itself under strict scrutiny. In such a case, the only unequal treatment would have resulted from the State's decision to discriminate on the basis of geography, a race-neutral selection criterion that has not generally been thought to necessitate close judicial review.

The majority ignores these concerns and simply applies the standing test set forth in *United States* v. *Hays*, 515 U. S. 737 (1995), on the apparent assumption that this test adequately identifies those who have been personally denied "equal treatment" on account of race. *Id.*, at 745. In *Hays*, the Court held that a plaintiff has standing to challenge a State's use of race in districting for *Shaw* claims if he (1) lives in a district that allegedly constitutes a racial gerrymander or (2) shows that, although he resides outside such a district, he has been personally subject to a racial classification. *Ante*, at 904. On this basis, the Court concludes that none of the plaintiffs in this action has standing to challenge District 1, but that two of them have standing to challenge District 12. *Ibid.*

As I understand it, the distinction drawn in *Hays* between those who live within a district, and those who do not, is thought to be relevant because voters who live in the "gerrymandered" district will have suffered the "personal" injuries inflicted by race-based districting more than other state residents.[5] Those injuries are said to be "representational" harms in the sense that race-based districting may cause officeholders to represent only those of the majority race in their district, or "stigmatic" harms, in the sense that the race-based line-drawing may promote racial hostility. *United States* v. *Hays*, 515 U. S., at 744–745; *Shaw I*, 509 U. S., at 646–649.

---

[5] As I have explained, even if the *Hays* test showed that much, it would still only demonstrate that the State had used geography, rather than race, to select the citizens who would be deprived of a color-blind districting process.

Even if I were to accept the flawed assumption that the *Hays* test serves to identify any voter who has been burdened more than any other as a consequence of his race, I would still find it a most puzzling inquiry. What the Court fails to explain, as it failed to explain in *Hays*, is why evidence showing either that one lives in an allegedly racially gerrymandered district or that one's district assignment directly resulted from a racial classification should suffice to distinguish those who have suffered the representational and stigmatic harms that supposedly follow from race-based districting from those who have not.

If representational injuries are what one must show to secure standing under *Hays*, then a demonstration that a voter's race led to his assignment to a particular district would perhaps be relevant to the jurisdictional inquiry, but surely not sufficient to satisfy it. There is no *necessary* correlation between race-based districting assignments and inadequate representation. See *Davis* v. *Bandemer*, 478 U. S. 109, 132 (1986) (opinion of White, J.). Indeed, any assumption that such a correlation exists could only be based on a stereotypical assumption about the kind of representation that politicians elected by minority voters are capable of providing. See *Miller* v. *Johnson*, 515 U. S., at 930 (STEVENS, J., dissenting).

To prove the representational harms that *Hays* holds are needed to establish standing to assert a *Shaw* claim, one would think that plaintiffs should be required to put forth evidence that demonstrates that their political representatives are actually unlikely to provide effective representation to those voters whose interests are not aligned with those of the majority race in their district. Here, as the record reveals, no plaintiff has made such a showing. See

861 F. Supp., at 424–425, 471, n. 59. Given our general reluctance to hear claims founded on speculative assertions of injury, I do not understand why the majority concludes that the speculative possibility that race-based districting "may" cause these plaintiffs to receive less than complete representation suffices to create a cognizable case or controversy. *United States* v. *Hays*, 515 U. S., at 745.

If under *Hays* the so-called "stigmatic" harms which result from extreme race-based districting suffice to secure standing, then I fail to see why it matters whether the litigants live within the "gerrymandered" district or were placed in a district as a result of their race. As I have pointed out, all voters in North Carolina would seem to be equally affected by the messages of "balkanization" or "racial apartheid" that racially gerrymandered maps supposedly convey, cf. *Davis*, 478 U. S., at 153 (O'CONNOR, J., concurring in judgment).

Even if race-based districting could be said to impose more personal harms than the so-called "stigmatic" harms that *Hays* itself identified, I do not understand why any voter's reputation or dignity should be *presumed* to have been harmed simply because he resides in a highly integrated, majority-minority voting district that the legislature has deliberately created. Certainly the background social facts are not such that we should presume that the "stigmatic harm" described in *Hays* and *Shaw I* amounts to that found cognizable under the Equal Protection Clause in *Brown* v. *Board of Education*, 347 U. S. 483, 495 (1954), where state-sponsored school segregation caused some students, but not others, to be stamped with a badge of inferiority on account of their race. See *Shaw I*, 509 U. S., at 682, n. 4 (SOUTER, J., dissenting).

In sum, even if it could be assumed that the plaintiffs in this case asserted the personalized injuries recognized in *Hays* at the time of *Shaw I* by virtue of their bare allegations of racial gerrymandering, they have surely failed to prove the existence of such injuries to the degree that we normally require at this stage of the litigation. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555 (1992). Thus, so long as the Court insists on treating this type of suit as a traditional equal protection claim, it must either mean to take a broader view of the power of federal courts to entertain challenges to race-based governmental action than it has heretofore adopted, see *Allen* v. *Wright*, 468 U. S. 737 (1984); cf. *Palmer*, 403 U. S., at 224–225, or to create a special exception to general jurisdictional limitations for plaintiffs such as those before us here. Suffice it to say, I charitably assume the former to be the case, and proceed to consider the merits on the assumption that *Shaw I* was correctly decided.

II

The District Court concluded that *Shaw I* required the application of strict scrutiny in any case containing proof that "racial considerations played a 'substantial' or 'motivating' role in the line-drawing process, even if they were not the only factor that influenced that process." 861 F. Supp., at 431. The court acknowledged that under this standard *any* deliberate effort to draw majority-minority districts in conformity with the Voting Rights Act would attract the strictest constitutional review, regardless of whether race-neutral districting criteria were also considered. *Id.*, at 429. As a consequence, it applied strict scrutiny in this case solely on the basis of North Carolina's concession that it sought to draw two majority-minority districts in order to comply with the Voting Rights Act, and without performing any inquiry into whether North Carolina had considered race-neutral districting criteria in drawing District 12's boundaries.

As the majority concludes, the District Court's test for triggering strict scrutiny set too low a threshold for subjecting a State's districting effort to rigorous, if not fatal, constitutional review. *Ante*, at 905. In my view, therefore, the Court should at the very least remand the case to allow the District Court, which possesses an obvious familiarity with the record and a superior understanding of local dynamics,[6] to make the fact-intensive inquiry into legislative purpose that the proper test for triggering strict scrutiny requires. Although I do not share the majority's willingness to divine on my own the degree to which race determined the precise contours of District 12, if forced to decide the matter on this record, I would reject the majority's conclusion that a fair application of precedent dictates that North Carolina's redistricting effort should be subject to strict scrutiny.

Subsequent to the District Court's decision, we handed down *Miller* v. *Johnson*, 515 U. S. 900 (1995), and issued our summary affirmance in *DeWitt* v. *Wilson*, 515 U. S. 1170 (1995). As I understand the *Miller* test, and as it was applied in *DeWitt*, state legislatures may take racial and ethnic characteristics of voters into account when they are drawing district boundaries without triggering strict scrutiny so long as race is not the "predominant" consideration guiding their deliberations. *Miller* v. *Johnson*, 515 U. S., at 916. To show that race has been "predominant," a plaintiff must show that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations" in drawing that district. *Ibid.;* see also *id.*, at 928 (O'CONNOR, J., concurring) ("To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices"); *DeWitt* v. *Wilson*, 856 F. Supp. 1409, 1412 (ED Cal. 1994), aff'd in part, dism'd in part, 515 U. S. 1170 (1995) (declining to apply strict scrutiny because State complied with traditional districting principles).

---

[6] That is particularly true here because the author of the District Court opinion was also the author of the District Court opinion in *Gingles* v. *Edmisten*, 590 F. Supp. 345 (EDNC 1984), aff'd in part, rev'd in part, *Thornburg* v. *Gingles*, 478 U. S. 30 (1986).

Indeed, the principal opinion in *Bush* v. *Vera, post,* p. 952, issued this same day, makes clear that the deliberate consideration of race in drawing district lines does not in and of itself invite constitutional suspicion. As the opinion there explains, our precedents do not require the application of strict scrutiny "to all cases of intentional creation of majority-minority districts." *Bush, post,* at 958. Rather, strict scrutiny should apply only upon a demonstration that "'race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.'" *Ibid.* (quoting *Miller,* 515 U. S., at 913).

Because "the legitimate consideration of race in a districting decision is usually inevitable under the Voting Rights Act when communities are racially mixed," *Shaw I,* 509 U. S., at 683 (SOUTER, J., dissenting), our decisions in *Miller, DeWitt,* and *Bush* have quite properly declined to deem all race-based districting subject to strict scrutiny. Unlike many situations in which the consideration of race itself necessarily gives rise to constitutional suspicion, see, *e. g., Batson* v. *Kentucky,* 476 U. S. 79 (1986); *Adarand Constructors, Inc.* v. *Peña,* 515 U. S. 200 (1995), our precedents have sensibly recognized that in the context of redistricting a plaintiff must demonstrate that race had been used in a particularly determinative manner before strict constitutional scrutiny should obtain. Cf. *Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265 (1978). This higher threshold for triggering strict scrutiny comports with the fact that the shared representational and stigmatic harms that *Shaw* purports to guard against are likely to occur only when the State subordinates race-neutral districting principles to a racial goal. See *Shaw I,* 509 U. S., at 646–649; 861 F. Supp., at 476–478 (Voorhees, C. J., dissenting); Pildes & Niemi, 92 Mich. L. Rev., at 499–524.

Shaw I is entirely consistent with our holdings that race-based districting which respects traditional districting principles does not give rise to constitutional suspicion. As the District Court noted, *Shaw I* expressly reserved the question whether "'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim." 861 F. Supp., at 429 (quoting *Shaw I*, 509 U. S., at 649). *Shaw I* held only that an equal protection claim could lie as a result of allegations suggesting that the State's districting was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, *without regard for traditional districting principles.*" *Id.*, at 642 (emphasis added).

Moreover, *Miller* belies the conclusion that strict scrutiny must apply to all deliberate attempts to draw majority-minority districts if the Equal Protection Clause is to provide any practical limitation on a State's power to engage in race-based districting. Although Georgia argued that it had complied with traditional districting principles, the *Miller* majority had little difficulty concluding that the State's race-neutral explanations were implausible. *Miller* v. *Johnson*, 515 U. S. 900 (1995).[7] Thus, *Miller* demonstrates that although States may avoid strict scrutiny by complying with traditional districting principles, they may not do so by proffering pretextual, race-neutral explanations for their maps.

The notion that conscientious federal judges will be able to distinguish race-neutral explanations from pretextual ones is hardly foreign to our race discrimination jurisprudence. In a variety of contexts, from employment to juror selection, we have required plaintiffs to demonstrate not only that a defendant's action could be understood as impermissibly race based, but also that the defendant's assertedly race-neutral explanation for that action was in fact a pretext for racial discrimination. *Purkett* v. *Elem*, 514 U. S. 765, 767–768 (1995); *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 518–519 (1993). Similarly, I understand *Shaw I*, *Miller*, *DeWitt*, and *Bush* to require plaintiffs to prove that the State did not respect traditional districting principles in drawing majority-minority districts. See *Bush*, *post*, at 958.

---

[7] For example, the State argued that it drew the majority-minority district under review so that it would follow precinct lines, but the Court found that precinct lines had been relied on only because they happened to facilitate the State's effort to achieve a particular racial makeup. Similarly, the State argued that District 11 was drawn in order to ensure that communities of interest would be kept within a single district, but the Court found that no such communities could be found within the district's boundaries. See *Miller* v. *Johnson*, 515 U. S., at 918–920.

In holding that the present record shows race to have been the "predominant" consideration in the creation of District 12, the Court relies on two pieces of evidence: the State's admission that its "overriding" purpose was to " 'create two congressional districts with effective black voting majorities,' " *ante*, at 906; and the " 'geographically non-compact' " shape of District 12, *ibid.* In my view, this evidence does not suffice to trigger strict scrutiny under the "demanding" test that *Miller* establishes. *Miller* v. *Johnson*, 515 U. S., at 928 (O'CONNOR, J., concurring).[8]

North Carolina's admission reveals that it intended to create a second majority-minority district.[9] That says nothing about whether it subordinated traditional districting principles in drawing District 12. States that conclude that federal law requires majority-minority districts have little choice but to give "overriding" weight to that concern. Indeed, in *Voinovich* v. *Quilter,* 507 U. S. 146, 159 (1993), we explained that evidence that showed that Ohio's chief mapmaker preferred "federal over state law when he believed the two in conflict does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy Clause of the United States Constitution." For that reason, we have not previously held that concessions such as North Carolina's suffice to trigger strict scrutiny. Cf. *Bush, post,* at 958, 962.[10] Thus, the State's concession is of little significance.

---

[8] It is unclear whether the majority believes that it is the combination of these two pieces of evidence that satisfies *Miller*, or whether either one would suffice.

[9] Citing to trial and deposition testimony, the majority also relies on a statement by North Carolina's chief mapmaker, Gerry Cohen, that the creation of a majority-minority district was the " 'principal reason' " for the configurations of District 1 and District 12. *Ante*, at 906. Mr. Cohen's more complete explanation of the " 'principal reason' " was to create "two majority black districts that had communities of interest within each one." Tr. 514. What Mr. Cohen admitted, therefore, was only that the State intentionally drew a majority-minority district that would respect traditional districting principles. Moreover, Mr. Cohen's "admission" in his deposition only pertained to District 1. App. 675. Finally, he explained in his deposition that "other reasons" also explained that district's configuration. *Ibid.* Absent a showing that those "other reasons" were race based, Mr. Cohen's admission does not show that North Carolina

District 12's noncompact appearance also fails to show that North Carolina engaged in suspect race-based districting. There is no federal statutory or constitutional requirement that state electoral boundaries conform to any particular ideal of geographic compactness. In addition, although the North Carolina Constitution requires electoral districts for state elective office to be *contiguous,* it does not require them to be geographically *compact.*[11] N. C. Const., Art. II,

---

subordinated race-neutral districting criteria in drawing District 1; it shows only that the need to comply with federal law was critical.

[10] In *DeWitt* v. *Wilson,* 856 F. Supp. 1409 (ED Cal. 1994), for example, the State conceded that compliance with §5 of the Voting Rights Act constituted the one unavoidable limitation on its redistricting process. *Id.,* at 1410. Nevertheless, we affirmed the District Court's conclusion that strict scrutiny did not apply because the State gave significant weight to several race-neutral considerations in meeting that goal. *Id.,* at 1415. Moreover, in *Miller* v. *Johnson,* 515 U. S. 900 (1995), the Court applied strict scrutiny only after it concluded that the State considered only race in adding African-American voters to District 11; it did not hold that Georgia's general admissions about its desire to comply with federal law themselves sufficed. *Id.,* at 917–919.

[11] The State Constitution sets forth no limitation on districting for federal offices. Moreover, the state-prepared 1991 Legislator's Guide to North Carolina Legislative and Congressional Redistricting points out

§§2, 5 (1984). Given that numerous States have written geographical compactness requirements into their State Constitutions, North Carolina's omission on this score is noteworthy. See Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L. Rev. 77, 84 (1985). It reveals that North Carolina's creation of a geographically noncompact district does not itself mark a deviation from any prevailing state districting principle.[12] Thus, while the serpentine character of District 12 may give rise to an *inference* that traditional districting principles were subordinated to race in determining its boundaries, it cannot fairly be said to *prove* that conclusion in light of the clear evidence demonstrating race-neutral explanations for the district's tortured shape. See *infra*, at 936–937.

There is a more fundamental flaw in the majority's conclusion that racial concerns predominantly explain the creation of District 12. The evidence of shape and intent relied on by the majority cannot overcome the basic fact that North Carolina did not have to draw Districts 1 and 12 in order to comply with the Justice Department's finding that federal law required the creation of two majority-minority districts. That goal could have been more straightfor-

---

that the state-law prohibition against dividing counties in formulating state electoral districts was eliminated in the 1980's. See Legislator's Guide to North Carolina Legislative and Congressional Redistricting 12 (Feb. 1991).

[12] Indeed, the State's guide to redistricting specifically informed state legislators that compactness was of little legal significance. "Neither the State nor federal constitution requires districts to be compact. Critics often refer to the lack of compactness of a particular district or group of districts as a sign of gerrymandering, but no court has ever struck down a plan merely on the basis that it did not appear to be compact. Although there are geometric methods for measuring the compactness of an area, these methods have not been recognized as judicial standards for evaluating the compactness of districts.

"The recent decision in *Davis* v. *Bandemer* . . . mentions irregularly-shaped districts as a possible sign of gerrymandering but makes clear that irregular shapes alone do not invalidate a redistricting plan." *Ibid.*

wardly accomplished by simply adopting the Attorney General's recommendation to draw a geographically compact district in the southeastern portion of the State in addition to the majority-minority district that had already been drawn in the northeastern and Piedmont regions. See *Shaw I*, 509 U. S., at 634–635; 861 F. Supp., at 460, 461–462, 464.

That the legislature chose to draw Districts 1 and 12 instead surely suggests that something more than the desire to create a majority-minority district took precedence. For that reason, this case would seem to present a version of the very hypothetical that the principal opinion in *Bush* suggests should pose no constitutional problem—"an otherwise compact majority-minority district that is misshapen by predominantly nonracial, political manipulation." *Bush, post,* at 981.

Here, no evidence suggests that race played any role in the legislature's decision to choose the winding contours of District 12 over the more cartographically pleasant boundaries proposed by the Attorney General.[13] Rather, the rec-

---

[13] The State's decision to give little weight to how the district would look on a map is entirely justifiable. Although a voter clearly has an interest in being in a district whose members share similar interests and concerns, that interest need not, and often is not, vindicated by drawing districts with attractive shapes. "[The Districts'] perceived 'ugliness'—their extreme irregularity of shape—is entirely a function of an artificial perspective unrelated to the common goings and comings of the citizen-voter. From the mapmaker's wholly imaginary vertical perspective at 1:25,000 or so range, a citizen may well find his district's one-dimensional, featureless shape aesthetically 'bizarre,' 'grotesque,' or 'ugly.' But back down at ground or eye-level, viewing things from his normal closely-bound horizontal perspective, the irregularity of outline or exact volume of the district in which he resides surely is not a matter of any great practical consequence to his conduct as a citizen-voter." 861 F. Supp. 408, 472, n. 60 (EDNC 1994).

In the same vein, I doubt that residents of hook-shaped Massachusetts receive less effective representation than their counterparts in perfectly rectangular Wyoming, or that the voting power of residents of Hawaii ord reveals that two race-neutral, traditional districting criteria determined District 12's shape: the interest in ensuring that incumbents would remain residents of the districts they have previously represented; and the interest in placing predominantly rural voters in one district and predominantly urban voters in another. 861 F. Supp., at 466–472; see also *Miller* v. *Johnson*, 515 U. S. 900 (1995) (considering whether communities of interest were preserved); *White* v. *Weiser*, 412 U. S. 783, 793–797 (1973) (establishing incumbency protection as a legitimate districting principle).

Unlike most States, North Carolina has not given its chief executive any power to veto enactments of its legislature. Thus, even though the voters had elected a Republican Governor, the Democratic majority in the legislature was in control of the districting process. It was the Democrats who first decided to adopt the 11-white-district plan that arguably would have violated § 2 of the Voting Rights Act and gave rise to the Attorney General's objection under § 5. It was also the Democrats who rejected Republican Party maps that contained two majority-minority districts because they created too many districts in which a majority of the residents were registered Republicans. 861 F. Supp., at 460.

If race rather than incumbency protection had been the dominant consideration, it seems highly unlikely that the Democrats would have drawn this bizarre district rather than accepting more compact options that were clearly available. If race, rather than politics, had been the "predominant" consideration for the Democrats, they could have accepted the Republican Plan, thereby satisfying the Attorney General and avoiding any significant risk of liability as well as the attack mounted by the plaintiffs in this case. Instead, as the detailed findings of the District Court demonstrate, the legislature deliberately crafted a districting plan that

---

is in any way impaired by virtue of the fact that their State is not even contiguous.

would accommodate the needs of Democratic incumbents. *Id.*, at 466–467.[14]

If the Democrats remain in control of the districting process after the remand in this case, it will be interesting to see whether they will be willing to sacrifice one or more Democratic-majority districts in order to create at least two districts with effective minority voting majorities. My review of the history revealed in the findings of the District Court persuades me that political considerations will probably take priority over racial considerations in the immediate future, just as they surely did during the process of rejecting the Republican Plan and ultimately adopting the plan challenged in this case.[15]

A deliberate effort to consolidate urban voters in one district and rural voters in another also explains District 12's highly irregular shape. Before District 12 had been drawn, members of the public as well as legislators had urged that "the observance of distinctive urban and rural communities of interest should be a prime consideration in the general redistricting process." *Id.*, at 466. As a result, the legislature was naturally attracted to a plan that, although less than esthetically pleasing, included both District 12, which links the State's major urban centers, and District 1, which has a population that predominantly lives in cities with populations of less than 20,000. *Id.*, at 467.

---

[14] It is ironic that despite the clear indications that party politics explain the district's odd shape, the Court affirmed the District Court's dismissal of the plaintiffs' partisan gerrymandering claim. See *Pope* v. *Blue*, 506 U. S. 801 (1992).

[15] Interestingly, the Justice Department concluded that it was the State's impermissible desire to favor white incumbents over African-American voters that explained North Carolina's refusal to create a second district and thus gave rise to a violation of the purpose prong of § 5 of the Voting Rights Act. See *Shaw I*, 509 U. S. 630, 635 (1993). Of course, the white plaintiffs before us here have no standing to object to District 12 on similar grounds.

Moreover, the record reveals that District 12's lines were drawn in order to unite an African-American community whose political tradition was quite distinct from the one that defines African-American voters in the Coastal Plain, which District 1 surrounds. *Ibid.* Indeed, two other majority-minority-district plans with less torturous boundaries were thought unsatisfactory precisely because they did not unite communities of interest. 861 F. Supp., at 465–466; Tr. 481. Significantly, the irregular contours of District 12 track the State's main interstate highway and are located entirely within the culturally distinct Piedmont Crescent region. 861 F. Supp., at 466. Clearly, then, District 12 was drawn around a community "defined by actual shared interests" rather than racial demography. *Miller* v. *Johnson,* 515 U. S., at 916; see also *Shaw I,* 509 U. S., at 647–648; *DeWitt* v. *Wilson,* 856 F. Supp., at 1412, 1413–1414 (recognizing that districts were "functionally" compact because they surrounded "communit[ies] of interest").

In light of the majority's decision not to remand for proper application of the *Miller* test, I do not understand how it can condemn the drawing of District 12 given these two race-neutral justifications for its shape. To be sure, in choosing a district that snakes rather than sits, North Carolina did not put a premium on geographical compactness. But I do not understand why that should matter in light of the evidence that shows that other race-neutral districting considerations were determinative.[16]

---

[16] Although the majority asserts that North Carolina "subordinated" traditional districting principles to racial concerns because "[r]ace was the criterion that, in the State's view, could not be compromised," *ante,* at 907, no evidence suggests that North Carolina would have sacrificed traditional districting principles in order to draw a second majority-minority district. Rather, the record reveals that the State chose District 12 over other options so that its plan would remain faithful to traditional, race-neutral districting criteria. If strict scrutiny applies even when a State draws a majority-minority district that respects traditional district-

III

As the foregoing discussion illustrates, legislative decisions are often the product of compromise and mixed motives. For that reason, I have always been skeptical about the value of motivational analysis as a basis for constitutional adjudication. See, *e. g., Washington* v. *Davis,* 426 U. S. 229, 253–254 (1976) (STEVENS, J., concurring). I am particularly skeptical of such an inquiry in a case of this type, as mixed motivations would seem to be endemic to the endeavor of political districting. See, *e. g, Bush, post,* at 959 ("The present suit is a mixed motive case").

The majority's analysis of the "compelling interest" issue nicely demonstrates the problem with parsing legislative motive in this context. The majority posits that the legislature's compelling interest in drawing District 12 was its desire to avoid liability under § 2 of the Voting Rights Act. Yet it addresses the question whether North Carolina had a compelling interest only because it first concludes that a racial purpose dominated the State's districting effort.

It seems to me that if the State's true purpose were to serve its compelling interest in staving off costly litigation by complying with federal law, then it cannot be correct to say that a racially discriminatory purpose *controlled* its line-drawing. A more accurate conclusion would be that the State took race into account only to the extent necessary to meet the requirements of a carefully thought out federal statute. See *Voinovich* v. *Quilter,* 507 U. S., at 159. The majority's implicit equation of the intentional consideration

---

ing principles, then I do not see how a State can ever create a majority-minority district in order to fulfill its obligations under the Voting Rights Act without inviting constitutional suspicion. I had thought that the "demanding" standard *Miller* established, *Miller* v. *Johnson,* 515 U. S., at 928 (O'CONNOR, J., concurring), as well as our summary affirmance in *DeWitt,* reflected our determination that States should not be so constrained.

of race in order to comply with the Voting Rights Act with intentional racial discrimination reveals the inadequacy of the framework it adopts for considering the constitutionality of race-based districting.

However, even if I were to assume that strict scrutiny applies, and thus that it makes sense to consider the question, I would not share the majority's hesitancy in concluding that North Carolina had a "compelling interest" in drawing District 12. In my view, the record identifies not merely one, but at least three acceptable reasons that may have motivated legislators to favor the creation of two such districts. Those three reasons easily satisfy the judicially created requirement that the state legislature's decision be supported by a "compelling state interest," particularly in a case in which the alleged injury to the disadvantaged class—*i. e.*, the majority of voters who are white—is so tenuous.

First, some legislators felt that the sorry history of race relations in North Carolina in past decades was a sufficient reason for making it easier for more black leaders to participate in the legislative process and to represent the State in the Congress of the United States. 861 F. Supp., at 462–463. Even if that history does not provide the kind of precise guidance that will justify certain specific affirmative-action programs in particular industries, see *ante*, at 909–910, it surely provides an adequate basis for a decision to facilitate the election of representatives of the previously disadvantaged minority.

As a class, state legislators are far more likely to be familiar with the role that race plays in electoral politics than they are with the role that it plays in hiring decisions within discrete industries. Moreover, given the North Carolina Legislature's own recent experience with voting rights litigation, see *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), as well as the fact that 40 of the State's districts are so-called covered jurisdictions which the Attorney General directly monitors as a result of prior discriminatory practices, see 42 U. S. C. § 1973c (1988 ed.), there is less reason to assume that the state legislative judgments under review here are based on unwarranted generalizations than may be true in other contexts. Thus, even if a desire to correct past discrimination did not itself drive the legislative decision to draw two majority-minority districts, it plainly constituted a legitimate and significant additional factor supporting the decision to do so. 861 F. Supp., at 472–473.

Second, regardless of whether § 5 of the Act was actually violated, I believe the State's interest in avoiding the litigation that would have been necessary to overcome the Attorney General's objection to the original plan provides an acceptable reason for creating a second majority-minority district. It is entirely proper for a State whose past practices have subjected it to the preclearance obligation set forth in § 5 to presume that the Attorney General's construction of the Act is correct, and to take corrective action rather than challenging him[17] in Court.

Moreover, even if the State's interest in avoiding a court challenge that might have succeeded does not constitute a sufficient justification for its decision to draw a majority-minority district, the State plainly had an interest in complying with a finding by the Attorney General that it reasonably believed could not have been successfully challenged in court. The majority disagrees, relying on our analysis in *Miller* v. *Johnson*, 515 U. S., at 920–925. That reliance is misplaced.

In *Miller*, the Court concluded that Georgia had simply acceded to the Attorney General's unreasonable construction of § 5 without performing any independent assessment of its validity. *Ibid.* By contrast, the District Court here found as a factual matter that the legislature's independent assessment of the reasons for the Attorney General's denial of preclearance led it to the reasonable conclusion that its 11-white district plan would violate the purpose prong of § 5. 861 F. Supp., at 474. As a result, I do not accept the Court's conclusion that it was unreasonable for the State to believe that its decision to draw 1 majority-minority district out of 12 would have been subject to a successful attack under the purpose prong of § 5. *Ante*, at 911–913.

---

[17] Although Attorney General Reno has endorsed the position taken by the Republican administration in 1991, it was her male predecessor who refused to preclear the State's original plan.

I acknowledge that when North Carolina sought preclearance it asserted nondiscriminatory reasons for deciding not to draw a second majority-minority district. See 861 F. Supp., at 480, n. 9 (Vorhees, C. J., dissenting). On careful reflection, however, the legislature concluded that those reasons would not likely suffice in a federal action to challenge the Attorney General's ruling. The District Court found that conclusion to be reasonable. *Id.*, at 474. I am mystified as to why this finding does not deserve our acceptance. Nor do I understand the Court's willingness to credit the State's declarations of nondiscriminatory purpose in this context, *ante*, at 912–913, in light of its unwillingness to accept any of North Carolina's race-neutral explanations for its decision to draw District 12, *ante*, at 905–906.

Third, regardless of the possible outcome of litigation alleging that § 2 of the Voting Rights Act would be violated by a plan that ensured the election of white legislators in 11 of the State's 12 congressional districts, the interest in avoiding the expense and unpleasantness of such litigation was certainly legitimate and substantial. That the legislature reasonably feared the possibility of a successful § 2 challenge cannot be credibly denied.[18]

---

[18] While the majority is surely correct in stating that the threat of a lawsuit, however unlikely to succeed, does not constitute a compelling interest, *ante*, at 908–909, n. 4, it does not follow that a State has no compelling interest in avoiding litigation over a substantial challenge. Here, of course, the District Court found that North Carolina premised its decision to draw a second majority-minority district on its reasonable conclusion

In the course of the redistricting debate, numerous maps had been presented showing that blacks could constitute more than 50 percent of the population in two districts. 861 F. Supp., at 460–461, 474. The District Court found that these plans had demonstrated that "the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts." *Id.*, at 464.

Moreover, the Attorney General denied preclearance on the ground that North Carolina could have created a second majority-minority district that *was*, under any reasonable standard, geographically compact. *Id.*, at 461–462; *Shaw I*, 509 U. S., at 635. Maps prepared by the plaintiff-intervenors for this litigation conclusively demonstrate that two compact, majority-minority districts could indeed have been drawn. 861 F. Supp., at 464–465; Plaintiff-Intervenors' Exh. 301, A2–A3.

Even if many of the maps proposing two majority-African-American districts were not particularly compact, the legislature reasonably concluded that a federal court might have determined that some of them could have provided the basis for a viable vote dilution suit pursuant to *Thornburg* v. *Gingles*, 478 U. S., at 50–51. 861 F. Supp., at 474. That conclusion is particularly reasonable in light of the fact that *Gingles* was a case fresh in the minds of many of North Carolina's state legislators, *id.*, at 463. There, the State challenged the plaintiffs' §2 claim by pointing to the oddly configured lines that defined their proposed majority-minority districts. See *Gingles* v. *Edmisten*, 590 F. Supp. 345, 373 (EDNC 1984). As we know, North Carolina's defense to §2 liability proved unsuccessful in that instance, even though the District Court acknowledged that the "single-member district specifically suggested by the plain-

---

that it would otherwise be subject to a *successful* §2 challenge, not a "meritless" one. *Ibid.*

tiffs as a viable one is obviously not a model of aesthetic tidiness." *Id.*, at 374.[19]

Finally, even if the record shows that African-American voters would not have composed more than 50 percent of the population in any plan containing two compact, majority-minority districts, the record reveals that it would have been possible to have drawn a map containing one compact district in which African-Americans would have composed more than 50 percent of the population and another compact district in which African-Americans, by reason of the large presence of Native Americans, would have by far constituted the largest racial group. Plaintiff-Intervenors' Exh. 301, A2–A3. Given our recent emphasis on considering the totality of the circumstances in § 2 cases, we are in no position to rebuke a State for concluding that a 40-plus percent African-American district could provide a defense to a viable *Gingles* challenge as surely as could one with a 50.1 percent African-American population. See *Johnson* v. *De Grandy*, 512 U. S. 997, 1009–1012 (1994); *Voinovich* v. *Quilter*, 507 U. S. 146 (1993); *Rural West Tennessee African-American Affairs Council, Inc.* v. *McWherter*, 877 F. Supp. 1096 (WD Tenn.), aff'd, 516 U. S. 801 (1995).[20]

---

[19] Interestingly, although this Court in *Thornburg* v. *Gingles* held that § 2 plaintiffs must demonstrate that they live in "compact" majority-minority districts, we affirmed the District Court which had found that the plaintiffs' proposed districts were contiguous but not compact. 478 U. S., at 38. Arguably, therefore, the State could have reasonably concluded that the maps proposing District 12 would have themselves provided the foundation for a viable § 2 suit. For a discussion of how compact "compact" districts must be, see Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 Harv. Civ. Rights-Civ. Lib. L. Rev. 173, 199–213 (1989). See also *Dillard* v. *Baldwin County Bd. of Ed.*, 686 F. Supp. 1459, 1465–1466 (MD Ala. 1988); *Houston* v. *Lafayette County, Miss.*, 56 F. 3d 606, 611 (CA5 1995).

[20] Moreover, Mr. Cohen, the State's chief mapmaker, testified at trial that in statewide elections, Native Americans and African-Americans in the southeastern portion of North Carolina had voted for the same candidates. Tr. 411–412.

IV

Although the Court assumes that North Carolina had a compelling interest in avoiding liability under § 2, *ante,* at 916, it avoids conclusively resolving that question because it holds that District 12 was not a "narrowly tailored" means of achieving that end. The majority reaches this conclusion by determining that District 12 did not "remedy" any potential violation of § 2 that may have occurred. *Ibid.*

In my judgment, if a State's new plan successfully avoids the potential litigation entirely, there is no reason why it must also take the form of a "remedy" for an unproven violation. Thus, the fact that no § 2 violation has been proved in the territory that constitutes District 12 does not show that the district fails to serve a compelling state interest. It shows only that a federal court, which is constrained by Article III, would not have had the power to *require* North Carolina to draw that district. It is axiomatic that a State should have more authority to institute a districting plan than would a federal court. *Voinovich* v. *Quilter,* 507 U. S., at 156–157.

That District 12 will protect North Carolina from liability seems clear. The record gives no indication that any of the potential § 2 claimants is interested in challenging the plan that contains District 12. Moreover, as a legal matter, North Carolina is in a stronger position to defend against a § 2 lawsuit with District 12 than without it.

Johnson v. *De Grandy* expressly states that, at least in the context of single-member districting plans, a plaintiff cannot make out a prima facie case of vote dilution under § 2 unless he can demonstrate that his proposed map contains *more* majority-minority districts than the State's. 512 U. S., at 1008. By creating a plan with two majority-minority districts here, the State would seem to have precluded potential litigants from satisfying that precondition.[21]

In addition, satisfaction of the so-called *Gingles* preconditions does not entitle an individual minority voter to inclusion in a majority-minority district. A court may conclude that a State must create such a district only after it considers the totality of the circumstances. A court would be remiss if it failed to take into account that the State had drawn majority-minority districts proportional to its minority population which include portions of the very minority community in which an individual minority plaintiff resides. Indeed, our recent decisions compel courts to perform just such a calculus. See *Johnson* v. *De Grandy,* 512 U. S., at 1012–1016; *Voinovich* v. *Quilter,* 507 U. S. 146 (1993); see also *African American Voting Rights Legal Defense Fund, Inc.* v. *Villa,* 54 F. 3d 1345, 1355–1357 (CA8 1995).

---

[21] The majority's assertion that *De Grandy* only requires a plaintiff to show that more "reasonably compact" majority-minority districts could have been drawn would seem to expand dramatically a State's potential liability under § 2. *Ante,* at 916, n. 8. I would have thought that a State that had drawn *three* majority-minority districts, one of which was "reasonably compact" and two of which straggled in order to preserve certain distinctive communities of interest, would at the very least be immune to a challenge by a single African-American plaintiff bearing a map proposing to draw but *two* compact majority-minority districts. The Court's expansive notion of § 2 liability, combined with its apparent eagerness to subject all legislative attempts to comply with that Act to strict scrutiny, will place many States in the untenable position of facing substantial litigation no matter how they draw their maps. See *Miller* v. *Johnson,* 515 U. S., at 949 (GINSBURG, J., dissenting).

Of course, a State that unfairly "packs" African-American voters into a limited number of districts may be subject to a § 2 challenge on the ground that it failed to create so-called "influence" districts, and perhaps the majority means to endorse that proposition as well. I note here, however, that there is no indication that such a challenge could be successfully brought against North Carolina's two majority-minority district plan, which creates districts with only bare African-American majorities.

Finally, North Carolina's chosen means of avoiding liability will impose none of the burdens on third parties that have made the Court wary of voluntary, race-based state action in the past. No white employees or applicants stand to lose jobs on account of their race as a result of North Carolina's actions. In fact, no white voters risk having their votes unlawfully diluted. At most, North Carolina's chosen means will require that some people of both races will be placed in districts other than those to which they would have otherwise been assigned. Even assuming that "burden" is more onerous when it results from racial considerations, it does not rise to a level of injury that justifies a federal court intruding on the State's discretion to formulate a plan that complies with the Voting Rights Act.

In fact, to the extent that plaintiffs in these cases premise their standing on the "representational" harms that they suffer, see *supra*, at 927–928, a State's decision to locate a majority-minority district outside the area that suffers from acute, racial bloc voting would seem to diminish the likelihood that representatives in majority-minority districts will serve only the interests of minority voters. After all, a representative of a majority-minority district that does not suffer from racial bloc voting cannot safely ignore the interests of voters of either race. In this respect, the majority's narrow tailoring requirement, by forcing States to remedy perceived § 2 violations only by drawing the district around the area in which the *Gingles* preconditions have been satisfied, has the perverse consequence of requiring States to inflict the very harm that supposedly renders racial gerrymandering challenges constitutionally cognizable.[22]

---

[22] The Court's strict analysis in this case is in some tension with the more reasonable approach endorsed by JUSTICE O'CONNOR this same day. On her view, state legislatures seeking to comply with the Voting Rights Act clearly possess more freedom to draw majority-minority districts than do federal courts attempting to enforce it. *Bush* v. *Vera*, *post*, at 994 (O'CONNOR, J., concurring).

Although I do not believe a judicial inquiry into "narrow tailoring" is either necessary or appropriate in these cases, the foregoing discussion reveals that the "narrow tailoring" requirement that the Court has fashioned is a pure judicial invention that unfairly deprives the legislature of a sovereign State of its traditional discretion in determining the boundaries of its electoral districts.[23] The Court's analysis gives rise to the unfortunate suggestion that a State that fears a §2 lawsuit must draw the precise district that it believes a federal court would have the power to impose. Such a proposition confounds basic principles of federalism, and forces States to imagine the legally "correct" outcome of a lawsuit that has not even been filed.

The proposition is also at odds with the course of the litigation that led to *Gingles* itself. In that case, the plaintiffs proposed a number of oddly configured majority-minority districts to prove their vote dilution claim. In implementing a remedy for the §2 violation, the federal court wisely permitted North Carolina to propose its own remedial districts, many of which were highly irregular in dimension. Indeed, so peculiar were some of the shapes concocted by the State that the *Gingles* plaintiffs challenged them on the grounds that they constituted racial gerrymanders which failed to remedy the very violations that had given rise to the need for their creation, and that they reflected only grudging responses designed to protect incumbent officeholders. *Gingles* v. *Edmisten,* 590 F. Supp., at 381.

Although the District Court in *Gingles* acknowledged that the State's plan was not the one that it would have implemented, it nonetheless concluded that the plan constituted a reasonable exercise of state legislative judgment. "[A] state legislature's primary jurisdiction for legislative apportionment and redistricting must include the right, free of judicial rejection, to implement state policies that may fail to remedy to the fullest extent possible the voting rights violations originally found." *Id.*, at 382.

---

[23] That judicial creativity rather than constitutional principle defines the narrowing tailoring requirement in this area of our law is clear from *Bush's* quite different analysis of the same question. See *Bush, post,* at 977.

In dramatic contrast, the Court today rejects North Carolina's plan because it does not provide the precise remedy that might have been ordered by a federal court, even though it satisfies potential plaintiffs, furthers such race-neutral legislative ends as incumbency protection and the preservation of distinct communities of interest, and essentially serves to insulate the State from a successful statutory challenge. There is no small irony in the fact that the Court's decision to intrude into the State's districting process comes in response to a lawsuit brought on behalf of white voters who have suffered no history of exclusion from North Carolina's political process, and whose only claims of harm are at best rooted in speculative and stereotypical assumptions about the kind of representation they are likely to receive from the candidates that their neighbors have chosen.

V

It is, of course, irrelevant whether we, as judges, deem it wise policy to create majority-minority districts as a means of assuring fair and effective representation to minority voters. We have a duty to respect Congress' considered judgment that such a policy may serve to effectuate the ends of the constitutional Amendment that it is charged with enforcing. We should also respect North Carolina's conscientious effort to conform to that congressional determination. Absent some demonstration that voters are being denied fair and effective representation as a result of their race, I find no basis for this Court's intervention into a process by which federal and state actors, both black and white, are jointly attempting to resolve difficult questions of politics and race that have long plagued North Carolina. Nor do I see how our constitutional tradition can countenance the suggestion that a State may draw unsightly lines to favor farmers or city dwellers, but not to create districts that benefit the very group whose history inspired the Amendment that the Voting Rights Act was designed to implement.

Because I have no hesitation in concluding that North Carolina's decision to adopt a plan in which white voters were in the majority in only 10 of the State's 12 districts did not violate the Equal Protection Clause, I respectfully dissent.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

My views on this case are substantially expressed in my dissent to *Bush* v. *Vera, post,* p. 952.

BUSH, GOVERNOR OF TEXAS, ET AL. *v.* VERA ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

No. 94–805. Argued December 5, 1995—Decided June 13, 1996*

Because the 1990 census revealed a population increase entitling Texas to three additional congressional seats, and in an attempt to comply with the Voting Rights Act of 1965 (VRA), the Texas Legislature promulgated a redistricting plan that, among other things, created District 30 as a new majority-African-American district in Dallas County and District 29 as a new majority-Hispanic district in Harris County, and reconfigured District 18, which is adjacent to District 29, as a majority-African-American district. After the Department of Justice precleared the plan under VRA § 5, the plaintiffs, six Texas voters, filed this challenge alleging that 24 of the State's 30 congressional districts constitute racial gerrymanders in violation of the Fourteenth Amendment. The three-judge District Court held Districts 18, 29, and 30 unconstitutional. The Governor of Texas, private intervenors, and the United States (as intervenor) appeal.

Held: The judgment is affirmed.

861 F. Supp. 1304, affirmed.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE and JUSTICE KENNEDY, concluded:

1. Plaintiff Chen, who resides in District 25 and has not alleged any specific facts showing that he personally has been subjected to any racial classification, lacks standing under *United States* v. *Hays*, 515 U. S. 737, 744–745. But plaintiffs Blum and Powers, who reside in District 18, plaintiffs Thomas and Vera, who reside in District 29, and plaintiff Orcutt, who resides in District 30, have standing to challenge Districts 18, 29, and 30. See, *e. g., ibid.* Pp. 957–958.

2. Districts 18, 29, and 30 are subject to strict scrutiny under this Court's precedents. Pp. 958–976.

(a) Strict scrutiny applies where race was "*the predominant* factor" motivating the drawing of district lines, see, *e. g., Miller* v. *Johnson*, 515 U. S. 900, 916 (emphasis added), and traditional, race-neutral districting principles were subordinated to race, see *ibid.* This is a mixed motive suit, and a careful review is therefore necessary to

---

*Together with No. 94–806, *Lawson et al.* v. *Vera et al.*, and No. 94–988, *United States* v. *Vera et al.*, also on appeal from the same court.

determine whether the districts at issue are subject to such scrutiny. Findings that Texas substantially neglected traditional districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data, taken together, weigh in favor of the application of strict scrutiny. However, because factors other than race, particularly incumbency protection, clearly influenced the legislature, each of the challenged districts must be scrutinized to determine whether the District Court's conclusion that race predominated can be sustained. Pp. 958–965.

(b) District 30 is subject to strict scrutiny. Appellants do not deny that the district shows substantial disregard for the traditional districting principles of compactness and regularity, or that the redistricters pursued unwaveringly the objective of creating a majority-African-American district. Their argument that the district's bizarre shape is explained by efforts to unite communities of interest, as manifested by the district's consistently urban character and its shared media sources and major transportation lines to Dallas, must be rejected. The record contains no basis for displacing the District Court's conclusion that race predominated over the latter factors, particularly in light of the court's findings that the State's supporting data were largely unavailable to the legislature before the district was created and that the factors do not differentiate the district from surrounding areas with the same degree of correlation to district lines that racial data exhibit. Appellants' more substantial claim that incumbency protection rivaled race in determining the district's shape is also unavailing. The evidence amply supports the District Court's conclusions that racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering, which is not subject to strict scrutiny, see *Davis* v. *Bandemer*, 478 U. S. 109, 132 (White, J., plurality opinion); and that political gerrymandering was accomplished in large part by the use of race as a proxy for political characteristics, which is subject to such scrutiny, cf. *Powers* v. *Ohio*, 499 U. S. 400, 410. Pp. 965–973.

(c) Interlocking Districts 18 and 29 are also subject to strict scrutiny. Those districts' shapes are bizarre, and their utter disregard of city limits, local election precincts, and voter tabulation district lines has caused a severe disruption of traditional forms of political activity and created administrative headaches for local election officials. Although appellants adduced evidence that incumbency protection played a role in determining the bizarre district lines, the District Court's conclusion that the districts' shapes are unexplainable on grounds other than race and, as such, are the product of presumptively unconstitutional racial gerrymandering is inescapably corroborated by the evidence. Pp. 973–976.

3. Districts 18, 29, and 30 are not narrowly tailored to serve a compelling state interest. Pp. 976–983.

(a) Creation of the three districts was not justified by a compelling state interest in complying with the "results" test of VRA §2(b). It may be assumed without deciding that such compliance can be a compelling state interest. See, *e. g., Shaw* v. *Hunt, ante,* at 915 *(Shaw II).* States attempting to comply with §2 retain discretion to apply traditional districting principles and are entitled to a limited degree of leeway. But a district drawn in order to satisfy §2 must not subordinate traditional districting principles to race substantially more than is reasonably necessary. The districts at issue fail this test, since all three are bizarrely shaped and far from compact, and those characteristics are predominantly attributable to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy. Appellants Lawson et al. misinterpret *Miller, supra,* at 913, when they argue that bizarre shaping and noncompactness go only to motive and are irrelevant to the narrow tailoring inquiry. Also unavailing is the United States' contention that insofar as bizarreness and noncompactness are necessary to achieve the State's compelling interest in compliance with §2 while simultaneously achieving other legitimate redistricting goals, the narrow tailoring requirement is satisfied. The bizarre shaping and noncompactness of the districts in question were predominantly attributable to racial, not political, manipulation, while the Government's argument addresses the case of an otherwise compact majority-minority district that is misshapen by predominantly nonracial, political manipulation. Pp. 976–981.

(b) The district lines at issue are not justified by a compelling state interest in ameliorating the effects of racially polarized voting attributable to Texas' long history of discrimination against minorities in electoral processes. Among the conditions that must be satisfied to render an interest in remedying discrimination compelling is the requirement that the discrimination be specific and "identified." *Shaw II, ante,* at 910. Here, the only current problem that appellants cite as in need of remediation is alleged vote dilution as a consequence of racial bloc voting, the same concern that underlies their VRA §2 compliance defense. Once the correct standard is applied, the fact that these districts are not narrowly tailored to comply with §2 forecloses this line of defense. Pp. 981–982.

(c) Creation of District 18 (only) was not justified by a compelling state interest in complying with VRA §5, which seeks to prevent voting-procedure changes leading to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. See, *e. g., Miller,* 515 U. S., at 926. The problem with appellants' contention that this "nonretrogression" principle applies because Harris County previously contained a congressional district in which African-American voters always succeeded in selecting African-American representatives is that it seeks to justify not maintenance, but substantial augmentation, of the African-American population percentage, which has grown from 40.8% in the previous district to 50.9% in District 18. Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success;* it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions. District 18 is not narrowly tailored to the avoidance of § 5 liability. See *Shaw* v. *Reno,* 509 U. S. 630, 655. Pp. 982–983.

4. Various of the dissents' arguments, none of which address the specifics of this suit, and which have been rebutted in other decisions, must be rejected. Pp. 983–986.

JUSTICE THOMAS, joined by JUSTICE SCALIA, concluded that application of strict scrutiny in this suit was never a close question, since this Court's decisions have effectively resolved that the intentional creation of majority-minority districts, by itself, is sufficient to invoke such scrutiny. See, *e. g., Adarand Constructors, Inc.* v. *Peña,* 515 U. S. 200, 227 (strict scrutiny applies to all government classifications based on race); *Miller* v. *Johnson,* 515 U. S. 900, 918–919 (Georgia's concession that it intentionally created majority-minority districts was sufficient to show that race was a predominant, motivating factor in its redistricting). *DeWitt* v. *Wilson,* 515 U. S. 1170, distinguished. Application of strict scrutiny is required here because Texas has readily admitted that it intentionally created majority-minority districts and that those districts would not have existed but for its affirmative use of racial demographics. Assuming that the State has asserted a compelling state interest, its redistricting attempts were not narrowly tailored to achieve that interest. Pp. 999–1003.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined. O'CONNOR, J., also filed a separate concurring opinion, *post,* p. 990. KENNEDY, J., filed a concurring opinion, *post,* p. 996. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post,* p. 999. STEVENS, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post,* p. 1003. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post,* p. 1045.

Javier Aguilar, Special Assistant Attorney General of Texas, argued the cause for appellants in No. 94–805. With him on the briefs were *Dan Morales,* Attorney General, *Jorge Vega,* First Assistant Attorney General, *Richard E. Gray III,* and *Roger Moore.*

Deputy Solicitor General Bender argued the cause for the United States in No. 94–988. With him on the briefs were *Solicitor General Days, Assistant Attorney General Patrick, Irving L. Gornstein,* and *Steven H. Rosenbaum.*

Penda D. Hair argued the cause and filed briefs for appellants in No. 94–806. With her on the briefs were *Elaine R. Jones, Theodore M. Shaw, Norman J. Chachkin, Antonia Hernandez, Anthony E. Chavez, Carmen Rumbaut,* and *Lawrence Boz.*

Daniel E. Troy argued the cause for appellees in all cases. With him on the brief were *Paul Loy Hurd, Bert W. Rein,* and *Michael E. Toner.*†

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE KENNEDY join.

This is the latest in a series of appeals involving racial gerrymandering challenges to state redistricting efforts in the wake of the 1990 census. See *Shaw* v. *Hunt, ante,* p. 899 *(Shaw II); United States* v. *Hays,* 515 U. S. 737 (1995); *Miller* v. *Johnson,* 515 U. S. 900 (1995); *Shaw* v. *Reno,* 509 U. S. 630 (1993) *(Shaw I).* That census revealed a population increase, largely in urban minority populations, that entitled Texas to three additional congressional seats. In response, and with a view to complying with the Voting Rights Act of 1965 (VRA), 79 Stat. 437, as amended, 42 U. S. C. § 1973 *et seq.*, the Texas Legislature promulgated a redistricting plan that, among other things, created District 30, a new majority-African-American district in Dallas County; created District 29, a new majority-Hispanic district in and around Houston in Harris County; and reconfigured District 18, which is adjacent to District 29, to make it a majority-African-American district. The Department of Justice precleared that plan under VRA § 5 in 1991, and it was used in the 1992 congressional elections.

---

†*Paul M. Smith, Donald B. Verrilli, Jr.,* and *J. Gerald Hebert* filed a brief for the Democratic National Committee et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Pacific Legal Foundation by *Anthony T. Caso* and *Deborah J. La Fetra;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amicus curiae* were filed for the Institute for Justice by *William H. Mellor III, Clint Bolick,* and *Scott G. Bullock;* and for A. J. Pate by *William C. Owens, Jr.*

The plaintiffs, six Texas voters, challenged the plan, alleging that 24 of Texas' 30 congressional districts constitute racial gerrymanders in violation of the Fourteenth Amendment. The three-judge United States District Court for the Southern District of Texas held Districts 18, 29, and 30 unconstitutional. *Vera* v. *Richards*, 861 F. Supp. 1304 (1994). The Governor of Texas, private intervenors, and the United States (as intervenor) now appeal. We noted probable jurisdiction. 515 U. S. 1172 (1995). Finding that, under this Court's decisions in *Shaw I* and *Miller*, the district lines at issue are subject to strict scrutiny, and that they are not narrowly tailored to serve a compelling state interest, we affirm.

I

As a preliminary matter, the State and private appellants contest the plaintiffs' standing to challenge these districts. Plaintiff Chen resides in Texas congressional District 25, and has not alleged any specific facts showing that he personally has been subjected to any racial classification. Under our decision in *Hays*, he lacks standing. See *Hays*, *supra*, at 744–745. But plaintiffs Blum and Powers are residents of District 18, plaintiffs Thomas and Vera are residents of District 29, and plaintiff Orcutt is a resident of District 30. We stated in *Hays* that "[w]here a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *Ibid.;* accord, *Miller, supra,* at 910–911. Under this rule, these plaintiffs have standing to challenge Districts 18, 29, and 30.

II

We must now determine whether those districts are subject to strict scrutiny. Our precedents have used a variety of formulations to describe the threshold for the application of strict scrutiny. Strict scrutiny applies where "redistricting legislation . . . is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles," *Shaw I, supra,* at 642, or where "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Miller,* 515 U. S., at 913, and "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations," *id.,* at 916. See also *id.,* at 928 (O'CONNOR, J., concurring) (strict scrutiny only applies where "the State has relied on race in substantial disregard of customary and traditional districting practices").

Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. See *Shaw I, supra,* at 646. Nor does it apply to all cases of intentional creation of majority-minority districts. See *DeWitt* v. *Wilson,* 856 F. Supp. 1409 (ED Cal. 1994) (strict scrutiny did not apply to an intentionally created compact majority-minority district), summarily aff'd, 515 U. S. 1170 (1995); cf. *Shaw I, supra,* at 649 (reserving this question). Electoral district lines are "facially race neutral," so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of "classifications based explicitly on race." See *Adarand Constructors, Inc.* v. *Peña,* 515 U. S.

200, 213 (1995); cf. *post,* at 999–1000, 1002–1003 (THOMAS, J., concurring in judgment) (assimilating our redistricting cases to *Adarand*). For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were "subordinated" to race. *Miller,* 515 U. S., at 916. By that, we mean that race must be "*the predominant* factor motivating the legislature's [redistricting] decision." *Ibid.* (emphasis added). We thus differ from JUSTICE THOMAS, who would apparently hold that it suffices that racial considerations be *a* motivation for the drawing of a majority-minority district. See *post,* at 1002.

The present suit is a mixed motive suit. The appellants concede that one of Texas' goals in creating the three districts at issue was to produce majority-minority districts, but they also cite evidence that other goals, particularly incumbency protection (including protection of "functional incumbents," *i. e.,* sitting members of the Texas Legislature who had declared an intention to run for open congressional seats), also played a role in the drawing of the district lines. The record does not reflect a history of " '*purely* race-based' " districting revisions. Cf. *Miller, supra,* at 918 (emphasis added). A careful review is, therefore, necessary to determine whether these districts are subject to strict scrutiny. But review of the District Court's findings of primary fact and the record convinces us that the District Court's determination that race was the "predominant factor" in the drawing of each of the districts must be sustained.

We begin with general findings and evidence regarding the redistricting plan's respect for traditional districting principles, the legislators' expressed motivations, and the methods used in the redistricting process. The District Court began its analysis by rejecting the factual basis for appellants' claim that Texas' challenged "districts cannot be unconstitutionally bizarre in shape because Texas does not have and never has used traditional redistricting principles such as natural geographical boundaries, contiguity, compactness, and conformity to political subdivisions." 861 F. Supp., at 1333. The court instead found that "generally, Texas has not intentionally disregarded traditional districting criteria," and that only one pre-1991 congressional district in Texas was comparable in its irregularity and noncompactness to the three challenged districts. *Id.*, at 1334. The court also noted that "compactness as measured by an 'eyeball' approach was much less important," *id.*, at 1313, n. 9, in the 1991 plan, App. 144, than in its predecessor, the 1980 Texas congressional districting plan, *id.*, at 138, and that districts were especially irregular in shape in the Dallas and Harris County areas where the challenged districts are located, see 861 F. Supp., at 1313, n. 9.

These findings comport with the conclusions of an instructive study that attempted to determine the relative compactness of districts nationwide in objective, numerical terms. That study gave Texas' 1980 districting plan a roughly average score for the compactness and regularity of its district shapes, but ranked its 1991 plan among the worst in the Nation. See Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw* v. *Reno*, 92 Mich. L. Rev. 483, 571–573, table 6 (1993). The same study ranked Districts 18, 29, and 30 among the 28 least regular congressional districts nationwide. See *id.*, at 565, table 3. Our own review gives us no reason to disagree with the District Court that the districts at issue "have no integrity in terms of traditional, neutral redistricting criteria," 861 F. Supp., at 1339.

The District Court also found substantial direct evidence of the legislature's racial motivations. The State's submission to the Department of Justice for preclearance under VRA §5 reports a consensus within the legislature that the three new congressional districts

> "'should be configured in such a way as to allow members of racial, ethnic, and language minorities to elect Congressional representatives. Accordingly, the three

> new districts include a predominantly black district drawn in the Dallas County area [District 30] and predominantly Hispanic districts in the Harris County area [District 29] and in the South Texas region. In addition to creating the three new minority districts, the proposed Congressional redistricting plan increases the black voting strength of the current District 18 (Harris County) by increasing the population to assure that the black community may continue to elect a candidate of its choice.'" *Id.*, at 1315 (quoting Narrative of Voting Rights Act Considerations in Affected Districts, reprinted in App. 104–105).

The appellants also conceded in this litigation that the three districts at issue "were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives to Congress." 861 F. Supp., at 1337. And testimony of individual state officials confirmed that the decision to create the districts now challenged as majority-minority districts was made at the outset of the process and never seriously questioned.

The means that Texas used to make its redistricting decisions provides further evidence of the importance of race. The primary tool used in drawing district lines was a computer program called "REDAPPL." REDAPPL permitted redistricters to manipulate district lines on computer maps, on which racial and other socioeconomic data were superimposed. At each change in configuration of the district lines being drafted, REDAPPL displayed updated racial composition statistics for the district as drawn. REDAPPL contained racial data at the block-by-block level, whereas other data, such as party registration and past voting statistics, were only available at the level of voter tabulation districts (which approximate election precincts). The availability and use of block-by-block racial data was unprecedented; before the 1990 census, data were not broken down beyond the census tract level. See App. 123. By providing uniquely detailed racial data, REDAPPL enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information. The District Court found that the districters availed themselves fully of that opportunity:

> "In numerous instances, the correlation between race and district boundaries is nearly perfect. . . . The borders of Districts 18, 29, and 30 change from block to block, from one side of the street to the other, and traverse streets, bodies of water, and commercially developed areas in seemingly arbitrary fashion until one realizes that those corridors connect minority populations." 861 F. Supp., at 1336.

These findings—that the State substantially neglected traditional districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data—together weigh in favor of the application of strict scrutiny. We do not hold that any one of these factors is independently sufficient to require strict scrutiny. The Constitution does not mandate regularity of district shape, see *Shaw I*, 509 U. S., at 647, and the neglect of traditional districting criteria is merely necessary, not sufficient. For strict scrutiny to apply, traditional districting criteria must be *subordinated to race*. *Miller*, 515 U. S., at 916. Nor, as we have emphasized, is the decision to create a majority-minority district objectionable in and of itself. The direct evidence of that decision is not, as JUSTICE STEVENS suggests, *post*, at 1024, "the real key" to our decision; it is merely one of several essential ingredients. Nor do we "condemn state legislation merely because it was based on accurate information." *Post*, at 1031, n. 28. The use of sophisticated technology and detailed information in the drawing of majority-minority districts is no more objectionable than it is in the drawing of majority-majority districts. But, as the District Court explained, the direct evidence of racial considerations, coupled with the fact that the computer program used was significantly *more* sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria here. We must therefore consider what role other factors played in order to determine whether race predominated.

Several factors other than race were at work in the drawing of the districts. Traditional districting criteria were not *entirely* neglected: Districts 18 and 29 maintain the integrity of county lines; each of the three districts takes its character from a principal city and the surrounding urban area; and none of the districts is as widely dispersed as the North Carolina district held unconstitutional in *Shaw II*, *ante*, p. 899. (These characteristics are, however, unremarkable in the context of large, densely populated urban counties.) More significantly, the District Court found that incumbency protection influenced the redistricting plan to an unprecedented extent:

> "[A]s enacted in Texas in 1991, many incumbent protection boundaries sabotaged traditional redistricting principles as they routinely divided counties, cities, neighborhoods, and regions. For the sake of maintaining or winning seats in the House of Representatives, Congressmen or would-be Congressmen shed hostile groups and potential opponents by fencing them out of their districts. The Legislature obligingly carved out districts of apparent supporters of incumbents, as suggested by the incumbents, and then added appendages to connect their residences to those districts. The final result seems not one in which the people select their representatives, but in which the representatives have selected the people." 861 F. Supp., at 1334 (citations and footnotes omitted).

See also *id.*, at 1317–1318 (describing specific evidence of incumbency protection efforts statewide). This finding receives inferential support from the fact that all but one of Texas' 27 incumbents won in the 1992 elections. See *id.*, at 1318. And the appellants point to evidence that in many cases, race correlates strongly with manifestations of community of interest (for example, shared broadcast and print media, public transport infrastructure, and institutions such as schools and churches) and with the political data that are vital to incumbency protection efforts, raising the possibility that correlations between racial demographics and district lines may be explicable in terms of nonracial motivations. For example, a finding by a district court that district lines were drawn in part on the basis of evidence (other than racial data) of where communities of interest existed might weaken a plaintiff's claim that race predominated in the drawing of district lines. Cf. *post*, at 1049 (SOUTER, J., dissenting) (recognizing the legitimate role of communities of interest in our system of representative democracy).

Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones. We have not subjected political gerrymandering to strict scrutiny. See *Davis* v. *Bandemer*, 478 U. S. 109, 132 (1986) (White, J., plurality opinion) ("[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole"); *id.*, at 147 (O'CONNOR, J., concurring in judgment) ("[P]urely political gerrymandering claims" are not justiciable). And we have recognized incumbency protection, at least in the limited form of "avoiding contests between incumbent[s]," as a legitimate state goal. See *Karcher* v. *Daggett*, 462 U. S. 725, 740 (1983); *White* v. *Weiser*, 412 U. S. 783, 797 (1973); *Burns* v. *Richardson*, 384 U. S. 73, 89, n. 16 (1966); cf. *Gaffney* v. *Cummings*, 412 U. S. 735, 751–754, and 752, n. 18 (1973) (State may draw irregular district lines in order to allocate seats proportionately to major political parties). Because it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must scrutinize each challenged district to determine whether the District Court's conclusion that race predominated over legitimate districting considerations, including incumbency, can be sustained.

A

The population of District 30 is 50% African-American and 17.1% Hispanic. Fifty percent of the district's population is located in a compact, albeit irregularly shaped, core in south Dallas, which is 69% African-American. But the remainder of the district consists of narrow and bizarrely shaped tentacles—the State identifies seven "segments"—extending primarily to the north and west. See App. 335; see also M. Barone & G. Ujifusa, Almanac of American Politics 1996, p. 1277 (1995) (describing the district). Over 98% of the district's population is within Dallas County, see App. 118, but it crosses two county lines at its western and northern extremities. Its western excursion into Tarrant County grabs a small community that is 61.9% African-American, *id.*, at 331; its northern excursion into Collin County occupies a hook-like shape mapping exactly onto the only area in the southern half of that county with a combined African-American and Hispanic percentage population in excess of 50%, *id.*, at 153. The District Court's description of the district as a whole bears repeating:

> "The district sprawls throughout Dallas County, deliberately excludes the wealthy white neighborhoods of Highland Park and University Park and extends fingers into Collin County, which include the outermost suburbs of Dallas. In Collin County, the district picks up a small African-American neighborhood. The district extends into Tarrant County only to pick up a small border area with a high African-American concentration. It

> also reaches out to claim Hamilton Park, an affluent African-American neighborhood surrounded by whites. Part of the district runs along Trinity River bottom, using it to connect dispersed minority population. Numerous [voter tabulation districts] were split in order to achieve the population mix required for the district.
>
> . . . . .
>
> ". . . It is at least 25 miles wide and 30 miles long." 861 F. Supp., at 1337–1338.

See also Appendix A to this opinion (outline of District 30).

Appellants do not deny that District 30 shows substantial disregard for the traditional districting principles of compactness and regularity, or that the redistricters pursued unwaveringly the objective of creating a majority-African-American district. But they argue that its bizarre shape is explained by efforts to unite communities of interest in a single district and, especially, to protect incumbents.

Appellants highlight the facts that the district has a consistently urban character and has common media sources throughout, and that its tentacles include several major transportation lines into the city of Dallas. These factors, which implicate traditional districting principles, do correlate to some extent with the district's layout. But we see no basis in the record for displacing the District Court's conclusion that race predominated over them, particularly in light of the court's findings that the State's supporting data were not "available to the Legislature in any organized fashion before District 30 was created," 861 F. Supp., at 1338, and that they do not "differentiate the district from surrounding areas," *ibid.*, with the same degree of correlation to district lines that racial data exhibit, see App. 150. In reaching that conclusion, we do not, as JUSTICE STEVENS fears, require States engaged in redistricting to compile "a comprehensive administrative record," *post*, at 1026 (STEVENS, J., dissenting), and we do not dismiss facts not explicitly mentioned in the redistricting plan's legislative history as "irrelevant," *ibid.* If, as may commonly happen, traditional districting principles are substantially followed without much conscious thought, they cannot be said to have been "subordinated to race." In considering whether race was the "predominant factor motivating the legislatur[e]," it is, however, *evidentially* significant that at the time of the redistricting, the State had compiled detailed racial data for use in redistricting, but made no apparent attempt to compile, and did not refer specifically to, equivalent data regarding communities of interest.

Appellants present a more substantial case for their claim that incumbency protection rivaled race in determining the district's shape. Representative Johnson was the principal architect of District 30, which was designed in part to create a safe Democratic seat for her. At an early stage in the redistricting process, Johnson submitted to the state legislature a plan for Dallas County with a relatively compact 44% African-American district that did not violate the integrity of any voter tabulation district or county lines. See App. 139; 861 F. Supp., at 1338. The District Court found that "[w]hile minority voters did not object" to it, *id.*, at 1330, "[t]hat plan drew much opposition from incumbents and was quickly abandoned," *id.*, at 1321, n. 22. "[F]ive other congressmen would have been thrown into districts other than the ones they currently represent." *Id.*, at 1330–1331. Appellants also point to testimony from Johnson and others to the effect that the incumbents of the adjacent Democratic Districts 5 and 24 exerted strong and partly successful efforts to retain predominantly African-American Democratic voters in their districts. (There was evidence that 97% of African-American voters in and around the city of Dallas vote Democrat.) See generally *id.*, at 1321–1322.

In some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness, in the drawing of bizarre district lines. And the fact that, "[a]s it happens, . . . many of the voters being fought over [by the neighboring Democratic incumbents] were African-American," *id.*, at 1338, would not, in and of itself, convert a political gerrymander into a racial gerrymander, no matter how conscious redistricters were of the correlation between race and party affiliation. See *Shaw I*, 509 U. S., at 646. If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify, just as racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime, cf. *post*, at 1032, n. 30 (STEVENS, J., dissenting) (discussing *United States* v. *Armstrong*, *ante*, at 456.

If the State's goal is otherwise constitutional political gerrymandering, it is free to use the kind of political data on which JUSTICE STEVENS focuses—precinct general election voting patterns, *post*, at 1030, precinct primary voting patterns, *post*, at 1017, and legislators' experience, *post*, at 1026—to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district. To the extent that the District Court suggested the contrary, it erred. But to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation. Cf. *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991) ("Race cannot be a proxy for determining juror bias or competence"). We cannot agree with the dissenters, see *post*, at 1031 (STEVENS, J., dissenting); *post*, at 1051–1052, n. 5 (SOUTER, J., dissenting); see also *Shaw II*, *ante*, at 924–925, n. 4 (STEVENS, J., dissenting), that racial stereotyping that we have scrutinized closely in the context of jury service can pass without justification in the context of voting. If the promise of the Reconstruction Amendments, that our Nation is to be free of state-sponsored discrimination, is to be upheld, we cannot pick and choose between the basic forms of political participation in our efforts to eliminate unjustified racial stereotyping by government actors.

Here, the District Court had ample bases on which to conclude both that racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering, and that political gerrymandering was accomplished in large part by the use of race as a proxy. The State's own VRA §5 submission explains the drawing of District 30, and the rejection of Johnson's more compact plan, in exclusively racial terms:

> "Throughout the course of the Congressional redistricting process, the lines of the proposed District 30 were constantly reconfigured in an attempt to maximize the voting strength for this black community in Dallas County . . . While the legislature was in agreement that a safe black district should be drawn in the Dallas County area, the real dispute involved the composition, configuration and *quality* of that district. The community insisted that [a] 'safe' black district be drawn that had a total black population of at least 50%. . . .
>
> ". . . Although some [alternative] proposals showed a more compact configuration, none of them reached the threshold 50% total black population which the community felt was necessary to assure its ability to elect its own Congressional representative without having to form coalitions with other minority groups. . . .
>
> ". . . The goal was to not only create a district that would maximize the opportunity for the black community to elect a Congressional candidate of its choice in 1992, but also one that included some of the major black growth areas which will assure continued electoral and economic opportunities over the next decades." App. 106–107.

As the District Court noted, testimony of state officials in earlier litigation (in which District 30 was challenged as a political gerrymander) contradicted part of their testimony here, and affirmed that "race was the primary consideration in the construction of District 30." 861 F. Supp., at 1338; see also *id.*, at 1319–1321. And Johnson explained in a letter to the Department of Justice written at the end of the redistricting process that incumbency protection had been achieved by using race as a proxy:

> " 'Throughout the course of the Congressional redistricting process, the lines were continuously reconfigured to assist in protecting the Democratic incumbents in the Dallas/Fort Worth metroplex area by spreading the Black population to increase the Democratic party index in those areas.' " *Id.*, at 1322 (quoting Plaintiff Exh. 6E6).

This is not to say that the direct evidence of the districters' intent showed race to be the sole factor considered. As JUSTICE STEVENS notes, *post*, at 1024–1025, nn. 23–24, state officials' claims have changed as their interests have changed. In the prior political gerrymandering suit and to the Department of Justice, they asserted that race predominated. In this suit, their testimony was that political considerations predominated. These inconsistent statements must be viewed in light of their adversarial context. But such questions of credibility are matters for the District Court, and we simply differ from the dissenters in our reading of the record when they find insupportable the District Court's reliance on the State's own statements indicating the importance of race, see *post*, at 1024–1025, nn. 23–24, 1033, n. 31 (opinion of STEVENS, J.).

Finally, and most significantly, the objective evidence provided by the district plans and demographic maps suggests strongly the predominance of race. Given that the districting software used by the State provided only racial data at the block-by-block level, the fact that District 30, unlike Johnson's original proposal, splits voter tabulation districts and even individual streets in many places, see App. 150; 861

F. Supp., at 1339, suggests that racial criteria predominated over other districting criteria in determining the district's boundaries. And, despite the strong correlation between race and political affiliation, the maps reveal that political considerations were subordinated to racial classification in the drawing of many of the most extreme and bizarre district lines. For example, the northernmost hook of the district, where it ventures into Collin County, is tailored perfectly to maximize minority population, see App. 153 (all whole and parts of 1992 voter tabulation districts within District 30's Collin County hook have a combined African-American and Hispanic population in excess of 50%, with an average African-American population of 19.8%, *id.*, at 331, while the combined African-American and Hispanic population in all surrounding voter tabulation districts, and the other parts of split districts, in Collin County is less than 25%), whereas it is far from the shape that would be necessary to maximize the Democratic vote in that area, see *id.*, at 196 (showing a Republican majority, based on 1990 voting patterns in seven of the eight 1990 voter tabulation districts wholly or partly included in District 30 in Collin County).*

---

*In the application of our precedents to District 30, our disagreement with JUSTICE STEVENS' dissent, *post*, at 1014–1031, is largely factual. In reviewing the District Court's findings of primary fact, we cannot ignore the reality that the District Court heard several days of testimony and argument and became significantly more familiar with the factual details of this suit than this Court can be. We therefore believe that the dissent errs in second-guessing the District Court's assessment of the witnesses' testimony, see *post*, at 1025, n. 24, and in dismissing as mere "fine tuning," *post*, at 1030, the practice of using race as a proxy that the District Court found, based on ample evidence, to be pervasive, see *Vera* v. *Richards*, 861 F. Supp 1304, 1322 (SD Tex. 1994).

For the same reason, we decline to debate the dissent on every factual nuance on which it diverges from the District Court's, and our, view. But two of its specific claims about District 30 merit a response. First, the dissent asserts that "[a] comparison of the *1992* precinct results with a depiction of the proportion of black population in each census block reveals that Democratic-leaning precincts cover a far greater area [of District 30]

The combination of these factors compels us to agree with the District Court that "the contours of Congressional District 30 are unexplainable in terms other than race." 861 F. Supp., at 1339. It is true that District 30 does not evince a consistent, single-minded effort to "segregate" voters on the basis of race, *post,* at 1023 (STEVENS, J., dissenting), and does not represent "apartheid," *post,* at 1054, 1074 (SOUTER, J., dissenting). But the fact that racial data were used in complex ways, and for multiple objectives, does not mean that race did not predominate over other considerations. The record discloses intensive and pervasive use of race both

---

than majority-black census blocks." *Post,* at 1030 (emphasis added). While that may be true, the dissent's reliance on *1992* election results is misplaced. Those results were not before the legislature when it drew the district lines in 1991, and may well reflect the popularity and campaign success of Representative Johnson more than the party political predispositions of the district's residents. (The same error infects the dissent's discussion of the Collin County hook, *post,* at 1020–1021, n. 19 (relying on 1992 election results).) And looking at totals, rather than at the difference between areas just inside and just outside the district lines, is misleading: Race may predominate in the drawing of district lines because those lines are finely drawn to maximize the minority composition of the district, notwithstanding that in an overwhelmingly Democratic area, the total of Democrats in the district far exceeds its total minority population.

Second, the dissent suggests that strict scrutiny should not apply because District 30's compact core has a higher African-American population percentage than its wayward tentacles. *Post,* at 1021–1023. In doing so, it again ignores the necessity of determining whether race predominated in the redistricters' actions *in light of what they had to work with.* Once various adjacent majority-minority populations had been carved away from it by the use of race as a proxy to enhance the electoral chances of neighboring incumbents, the core of District 30 was substantially too small to form an entire district. The principal question faced by the redistricters was, therefore, what territory to add to the core out of the remainder of the Dallas area, which remainder has an average African-American population substantially below the 21% county average. In answering that question, as the District Court explained and the maps bear witness, the redistricters created bizarre, far-reaching tentacles that intricately and consistently maximize the available remaining African-American population.

as a proxy to protect the political fortunes of adjacent incumbents, and for its own sake in maximizing the minority population of District 30 regardless of traditional districting principles. District 30's combination of a bizarre, noncompact shape and overwhelming evidence that that shape was essentially dictated by racial considerations of one form or another is exceptional; Texas Congressional District 6, for example, which JUSTICE STEVENS discusses in detail, *post*, at 1019–1020, has only the former characteristic. That combination of characteristics leads us to conclude that District 30 is subject to strict scrutiny.

B

In Harris County, centered on the city of Houston, Districts 18 and 29 interlock "like a jigsaw puzzle . . . in which it might be impossible to get the pieces apart." Barone & Ujifusa, Almanac of American Politics 1996, at 1307–1308; see also Appendixes B and C to this opinion (outlines of Districts 18, 29). As the District Court noted: "[T]hese districts are so finely 'crafted' that one *cannot* visualize their exact boundaries without looking at a map at least three feet square." 861 F. Supp., at 1323. According to the leading statistical study of relative district compactness and regularity, they are two of the three least regular districts in the country. See Pildes & Niemi, 92 Mich. L. Rev., at 565.

District 18's population is 51% African-American and 15% Hispanic. App. 110. It "has some of the most irregular boundaries of any congressional district in the country[,] . . . boundaries that squiggle north toward Intercontinental Airport and northwest out radial highways, then spurt south on one side toward the port and on the other toward the Astrodome." Barone & Ujifusa, *supra*, at 1307. Its "many narrow corridors, wings, or fingers . . . reach out to enclose black voters, while excluding nearby Hispanic residents." Pildes & Niemi, *supra*, at 556.

District 29 has a 61% Hispanic and 10% African-American population. App. 110. It resembles

> "'a sacred Mayan bird, with its body running eastward along the Ship Channel from downtown Houston until the tail terminates in Baytown. Spindly legs reach south to Hobby Airport, while the plumed head rises northward almost to Intercontinental. In the western extremity of the district, an open beak appears to be searching for worms in Spring Branch. Here and there, ruffled feathers jut out at odd angles.'" Barone & Ujifusa, *supra,* at 1335.

Not only are the shapes of the districts bizarre; they also exhibit utter disregard of city limits, local election precincts, and voter tabulation district lines. See, *e. g.,* 861 F. Supp., at 1340 (60% of District 18 and District 29 residents live in split precincts). This caused a severe disruption of traditional forms of political activity. Campaigners seeking to visit their constituents "had to carry a map to identify the district lines, because so often the borders would move from block to block"; voters "did not know the candidates running for office" because they did not know which district they lived in. *Ibid.* In light of Texas' requirement that voting be arranged by precinct, with each precinct representing a community that shares local, state, and federal representatives, it also created administrative headaches for local election officials:

> "The effect of splitting dozens of [voter tabulation districts] to create Districts 18 and 29 was an electoral nightmare. Harris County estimated that it must increase its number of precincts from 672 to 1,225 to accommodate the new Congressional boundaries. Polling places, ballot forms, and the number of election employees are correspondingly multiplied. Voters were thrust into new and unfamiliar precinct alignments, a few with populations as low as 20 voters." *Id.,* at 1325.

See also App. 119–127 (letter from local official setting forth administrative problems and conflict with local districting traditions); *id.*, at 147 (map showing splitting of city limits); *id.*, at 128, Plaintiffs' Exh. 6E1, Attachment A (map illustrating splitting of voting precincts).

As with District 30, appellants adduced evidence that incumbency protection played a role in determining the bizarre district lines. The District Court found that one constraint on the shape of District 29 was the rival ambitions of its two "functional incumbents," who distorted its boundaries in an effort to include larger areas of their existing state legislative constituencies. 861 F. Supp., at 1340. But the District Court's findings amply demonstrate that such influences were overwhelmed in the determination of the districts' bizarre shapes by the State's efforts to maximize racial divisions. The State's VRA § 5 submission explains that the bizarre configuration of Districts 18 and 29 "result[s] in the maximization of minority voting strength" in Harris County, App. 110, corroborating the District Court's finding that "[i]n the earliest stages of the Congressional redistricting process, state Democratic and Republican leaders rallied behind the idea of creating a new Hispanic safe seat in Harris County while preserving the safe African-American seat in District 18." 861 F. Supp., at 1324. State officials testified that "it was particularly necessary to split [voter tabulation districts] in order to capture pockets of Hispanic residents" for District 29, and that a 61% Hispanic population in that district—not a mere majority—was insisted upon. *Id.*, at 1340–1341. The record evidence of the racial demographics and voting patterns of Harris County residents belies any suggestion that party politics could explain the dividing lines between the two districts: The district lines correlate almost perfectly with race, see App. 151–152, while both districts are similarly solidly Democratic, see *id.*, at 194. And, even more than in District 30, the intricacy of the lines drawn, separating Hispanic voters from African-American voters on a block-by-block basis, betrays the critical impact of the block-by-block racial data available on the REDAPPL program. The District Court's conclusion is, therefore, inescapable: "Because Districts 18 and 29 are formed in utter disregard for traditional redistricting criteria and because their shapes are ultimately unexplainable on grounds other than the racial quotas established for those districts, they are the product of [presumptively] unconstitutional racial gerrymandering." 861 F. Supp., at 1341.

III

Having concluded that strict scrutiny applies, we must determine whether the racial classifications embodied in any of the three districts are narrowly tailored to further a compelling state interest. Appellants point to three compelling interests: the interest in avoiding liability under the "results" test of VRA § 2(b), the interest in remedying past and present racial discrimination, and the "nonretrogression" principle of VRA § 5 (for District 18 only). We consider them in turn.

A

Section 2(a) of the VRA prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." In 1982, Congress amended the VRA by changing the language of § 2(a) and adding § 2(b), which provides a "results" test for violation of § 2(a). A violation exists if,

> "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b).

Appellants contend that creation of each of the three majority-minority districts at issue was justified by Texas' compelling state interest in complying with this results test.

As we have done in each of our previous cases in which this argument has been raised as a defense to charges of racial gerrymandering, we assume without deciding that compliance with the results test, as interpreted by our precedents, see, *e. g., Growe* v. *Emison*, 507 U. S. 25, 37–42 (1993), can be a compelling state interest. See *Shaw II, ante*, at 915; *Miller*, 515 U. S., at 920–921. We also reaffirm that the "narrow tailoring" requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests. If the State has a "strong basis in evidence," *Shaw I*, 509 U. S., at 656 (internal quotation marks omitted), for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race "substantially addresses the § 2 violation," *Shaw II, ante*, at 918, it satisfies strict scrutiny. We thus reject, as impossibly stringent, the District Court's view of the narrow tailoring requirement, that "a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria." 861 F. Supp., at 1343. Cf. *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 291 (1986) (O'CONNOR, J., concurring in part and concurring in judgment) (state actors should not be "trapped between the competing hazards of liability" by the imposition of unattainable requirements under the rubric of strict scrutiny).

A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless "beauty contests." The dissenters misread us when they make the leap from our disagreement about the facts of this suit to the conclusion that we are creating a "stalemate" by requiring the States to "get things just right," *post,* at 1063 (SOUTER, J., dissenting), or to draw "the precise compact district that a court would impose in a successful § 2 challenge," *post,* at 1035 (STEVENS, J., dissenting); see also *Shaw II, ante,* at 949 (STEVENS, J., dissenting). Rather, we adhere to our longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan. See *Voinovich* v. *Quilter,* 507 U. S. 146, 156 (1993) ("[I]t is the domain of the States, and not the federal courts, to conduct apportionment in the first place"); *Miller, supra,* at 915 ("It is well settled that reapportionment is primarily the duty and responsibility of the State") (internal quotation marks omitted). Under our cases, the States retain a flexibility that federal courts enforcing § 2 lack, both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability. And nothing that we say today should be read as limiting "a State's discretion to apply traditional districting principles," *post,* at 1046 (SOUTER, J., dissenting), in majority-minority, as in other, districts. The constitutional problem arises only from the subordination of those principles to race.

Strict scrutiny remains, nonetheless, strict. The State must have a "strong basis in evidence" for finding that the threshold conditions for § 2 liability are present:

> "first, 'that [the minority group] is sufficiently large and *geographically compact* to constitute a majority in a single member district'; second, 'that it is politically cohesive'; and third, 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *Growe, supra,* at 40 (emphasis added) (quoting *Thornburg* v. *Gingles,* 478 U. S. 30, 50–51 (1986)).

And, as we have noted above, the district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is "reasonably necessary" to avoid § 2 liability. Districts 18, 29, and 30 fail to meet these requirements.

We assume, without deciding, that the State had a "strong basis in evidence" for finding the second and third threshold conditions for § 2 liability to be present. We have, however, already found that all three districts are bizarrely shaped and far from compact, and that those characteristics are predominantly attributable to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy. See Part II, *supra.* District 30, for example, reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district, and does so in order to make up for minority populations closer to its core that it shed in a further suspect use of race as a proxy to further neighboring incumbents' interests. See *supra,* at 965–966, 969–973.

These characteristics defeat any claim that the districts are narrowly tailored to serve the State's interest in avoiding liability under § 2, because § 2 does not require a State to create, on predominantly racial lines, a district that is not "reasonably compact." See *Johnson* v. *De Grandy,* 512 U. S. 997, 1008 (1994). If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district; if a reasonably compact district can be created, nothing in § 2 requires the race-based creation of a district that is far from compact.

Appellants argue that bizarre shaping and noncompactness do not raise narrow tailoring concerns. Appellants Lawson et al. claim that under *Shaw I* and *Miller,* "[s]hape is relevant only as evidence of an improper motive."

Brief for Appellants Lawson et al. 56. They rely on our statement in *Miller:*

> "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." 515 U. S., at 913.

The United States takes a more moderate position, accepting that in the context of narrow tailoring, "consideration must be given to the extent to which the districts drawn by a State substantially depart from its customary redistricting practices," Brief for United States 36, but asserting that insofar as bizarreness and noncompactness are necessary to achieve the State's compelling interest in compliance with § 2 "while simultaneously achieving other legitimate redistricting goals," *id.*, at 37, such as incumbency protection, the narrowly tailoring requirement is satisfied. Similarly, JUSTICE STEVENS' dissent argues that "noncompact districts should . . . be a permissible method of avoiding violations of [§ 2]." *Post*, at 1034.

These arguments cannot save the districts before us. The Lawson appellants misinterpret *Miller:* District shape is not irrelevant to the narrow tailoring inquiry. Our discussion in *Miller* served only to emphasize that the ultimate constitutional values at stake involve the harms caused by the use of unjustified racial classifications, and that bizarreness is not necessary to trigger strict scrutiny. See *Miller*, 515 U. S., at 912–913. Significant deviations from traditional districting principles, such as the bizarre shape and noncompactness demonstrated by the districts here, cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial. For example, the bizarre shaping of Districts 18 and 29, cutting across pre-existing precinct lines and other natural or traditional divisions, is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race.

Nor is the United States' argument availing here. In determining that strict scrutiny applies here, we agreed with the District Court that in fact the bizarre shaping and noncompactness of these districts were predominantly attributable to racial, not political, manipulation. The United States' argument, and that of the dissent, *post,* at 1033–1035 (STEVENS, J., dissenting), address the case of an otherwise compact majority-minority district that is misshapen by predominantly nonracial, political manipulation. See also *post,* at 1068 (SOUTER, J., dissenting) (raising "the possibility that a State could create a majority-minority district that does not coincide with the *Gingles* shape so long as racial data are not overused"). We disagree with the factual premise of JUSTICE STEVENS' dissent, that these districts were drawn using "racial considerations only in a way reasonably designed" to avoid a § 2 violation, *post,* at 1035. The districts before us exhibit a level of racial manipulation that exceeds what § 2 could justify.

B

The United States and the State next contend that the district lines at issue are justified by the State's compelling interest in "ameliorating the effects of racially polarized voting attributable to past and present racial discrimination." Brief for United States 32; Brief for Appellants Bush et al. 24–25. In support of that contention, they cite Texas' long history of discrimination against minorities in electoral processes, stretching from the Reconstruction to modern times, including violations of the Constitution and of the VRA. See, *e. g., Williams* v. *Dallas,* 734 F. Supp. 1317 (ND Tex. 1990); *White* v. *Regester,* 412 U. S. 755 (1973); *Terry* v. *Adams,* 345 U. S. 461 (1953); *Smith* v. *Allwright,* 321 U. S. 649 (1944); *Nixon* v. *Condon,* 286 U. S. 73 (1932); *Nixon* v.

Herndon, 273 U. S. 536 (1927); see also 861 F. Supp., at 1317 (because of its history of official discrimination, Texas became a covered jurisdiction under VRA § 5 in 1975, and the Department of Justice has since "frequently interposed objections against the State and its subdivisions"). Appellants attempt to link that history to evidence that in recent elections in majority-minority districts, "Anglos usually bloc voted against" Hispanic and African-American candidates. *Ibid.*

A State's interest in remedying discrimination is compelling when two conditions are satisfied. First, the discrimination that the State seeks to remedy must be specific, "identified discrimination"; second, the State "must have had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative action program.'" *Shaw II, ante,* at 910 (citations omitted). Here, the only current problem that appellants cite as in need of remediation is alleged vote dilution as a consequence of racial bloc voting, the same concern that underlies their VRA § 2 compliance defense, which we have assumed to be valid for purposes of this opinion. We have indicated that such problems will not justify race-based districting unless "the State employ[s] sound districting principles, and . . . the affected racial group's residential patterns afford the opportunity of creating districts in which they will be in the majority." *Shaw I,* 509 U. S., at 657 (internal quotation marks omitted). Once that standard is applied, our agreement with the District Court's finding that these districts are not narrowly tailored to comply with § 2 forecloses this line of defense.

C

The final contention offered by the State and private appellants is that creation of District 18 (only) was justified by a compelling state interest in complying with VRA § 5. We have made clear that § 5 has a limited substantive goal: "'to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Miller*, 515 U. S., at 926 (quoting *Beer* v. *United States*, 425 U. S. 130, 141 (1976)). Appellants contend that this "nonretrogression" principle is implicated because Harris County had, for two decades, contained a congressional district in which African-American voters had succeeded in selecting representatives of their choice, all of whom were African-Americans.

The problem with the State's argument is that it seeks to justify not maintenance, but substantial augmentation, of the African-American population percentage in District 18. At the previous redistricting, in 1980, District 18's population was 40.8% African-American. Plaintiffs' Exh. 13B, p. 55. As a result of Hispanic population increases and African-American emigration from the district, its population had reached 35.1% African-American and 42.2% Hispanic at the time of the 1990 census. The State has shown no basis for concluding that the *increase* to a 50.9% African-American population in 1991 was necessary to ensure nonretrogression. Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success;* it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions. We anticipated this problem in *Shaw I*, 509 U. S., at 655: "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." Applying that principle, it is clear that District 18 is not narrowly tailored to the avoidance of § 5 liability.

IV

The dissents make several further arguments against today's decision, none of which address the specifics of this case. We have responded to these points previously. JUSTICE SOUTER, for example, reiterates his contention from

Shaw I that because districts created with a view to satisfying §2 do not involve "racial subjugation," *post*, at 1055, and may in a sense be "'benign[ly]'" motivated, *Shaw I*, 509 U. S., at 685 (SOUTER, J., dissenting), strict scrutiny should not apply to them. We rejected that argument in *Shaw I*, and we reject it now. As we explained then, see *id.*, at 653, we subject racial classifications to strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign—as JUSTICE STEVENS' hypothetical of a targeted outreach program to protect victims of sickle cell anemia, see *post*, at 1032, would, no doubt, be—or whether they misuse race and foster harmful and divisive stereotypes without a compelling justification. We see no need to revisit our prior debates.

Both dissents contend that the recognition of the *Shaw I* cause of action threatens public respect for, and the independence of, the Federal Judiciary by inserting the courts deep into the districting process. We believe that the dissents both exaggerate the dangers involved, and fail to recognize the implications of their suggested retreat from *Shaw I*.

As to the dangers of judicial entanglement, JUSTICE STEVENS' dissent makes much of cases stemming from state districting plans originally drawn up before *Shaw I*, in which problems have arisen from the uncertainty in the law prior to and during its gradual clarification in *Shaw I*, *Miller*, and today's cases. See *post*, at 1037–1038 (STEVENS, J., dissenting). We are aware of the difficulties faced by the States, and by the district courts, in confronting new constitutional precedents, and we also know that the nature of the expressive harms with which we are dealing, and the complexity of the districting process, are such that bright-line rules are not available. But we believe that today's decisions, which both illustrate the defects that offend the principles of *Shaw I* and reemphasize the importance of the States' discretion in the redistricting process, see *supra*, at 978–979, will serve to clarify the States' responsibilities. The States have traditionally guarded their sovereign districting prerogatives jealously, and we are confident that they can fulfill that requirement, leaving the courts to their customary and appropriate backstop role.

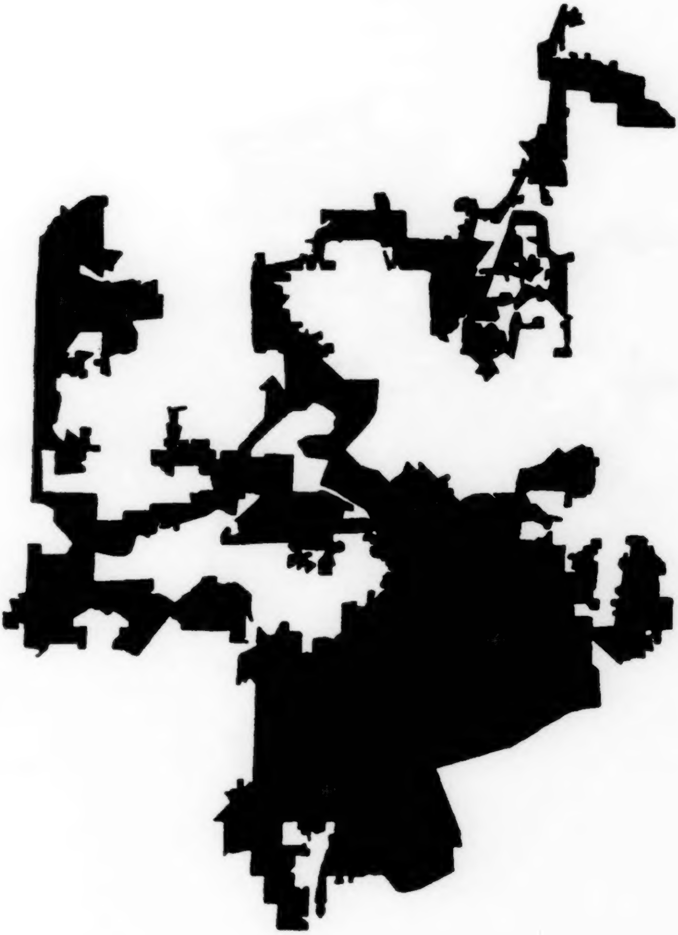
This Court has now rendered decisions after plenary consideration in five cases applying the *Shaw I* doctrine (*Shaw I*, *Miller*, *Hays*, *Shaw II*, and this suit). The dissenters would have us abandon those precedents, suggesting that fundamental concerns relating to the judicial role are at stake. See *post*, at 1035, 1038, 1041 (STEVENS, J., dissenting); *post*, at 1047, and n. 2, 1052, 1064, 1074, 1076–1077 (SOUTER, J., dissenting); *Shaw II*, *ante*, at 919–920, 922–923, and n. 3, 929 (STEVENS, J., dissenting); but see *ante*, at 932–933 (noting that the judicial task of distinguishing race-based from non-race-based action in *Shaw I* cases is far from unique). While we agree that those concerns are implicated here, we believe they point the other way. Our legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds. Legislators and district courts nationwide have modified their practices—or, rather, reembraced the traditional districting practices that were almost universally followed before the 1990 census—in response to *Shaw I*. Those practices and our precedents, which acknowledge voters as more than mere racial statistics, play an important role in defining the political identity of the American voter. Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes. See, *e. g.*, *Georgia* v. *McCollum*, 505 U. S. 42, 59 (1992) ("[T]he exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party"); *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 630–631 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury"); *Powers*, 499 U. S., at 410 ("We may not accept as a defense to racial discrimination the very stereotype the law condemns"); *Holland* v. *Illinois*, 493 U. S. 474, 484, n. 2 (1990) ("[A] prosecutor's 'assumption that a black juror may be presumed to be partial simply because he is black' . . . violates the Equal Protection Clause"); *Batson* v. *Kentucky*, 476 U. S. 79, 104 (1986) ("[T]he Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes"). We decline to retreat from that commitment today.

* * *

The judgment of the District Court is

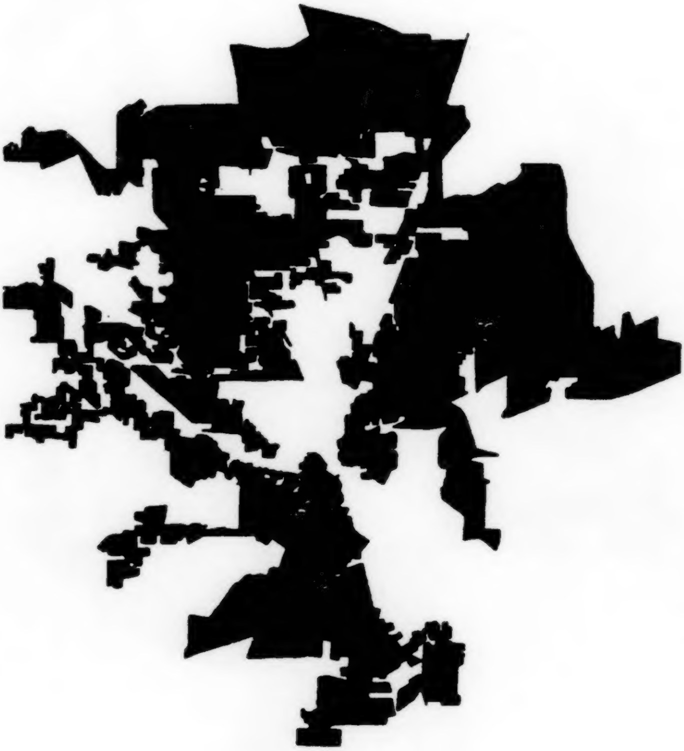
Affirmed.

APPENDIX A TO OPINION OF O'CONNOR, J.



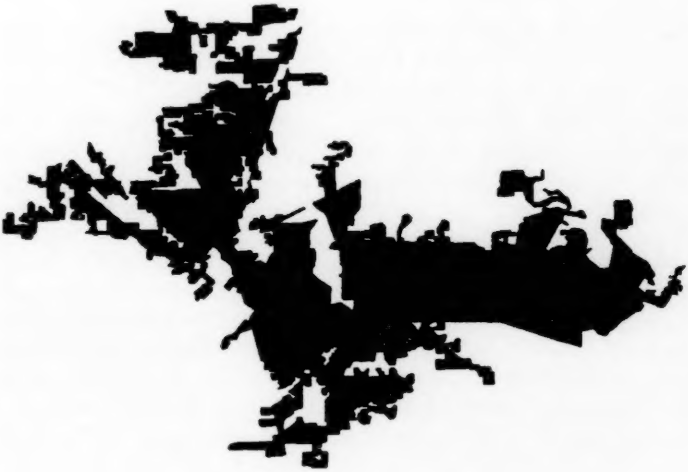
TEXAS CONGRESSIONAL DISTRICT 30

APPENDIX B TO OPINION OF O'CONNOR, J.



TEXAS CONGRESSIONAL DISTRICT 18

APPENDIX C TO OPINION OF O'CONNOR, J.



TEXAS CONGRESSIONAL DISTRICT 29

JUSTICE O'CONNOR, concurring.

I write separately to express my view on two points. First, compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest. Second, that test can coexist in principle and in practice with *Shaw* v. *Reno,* 509 U. S. 630 (1993), and its progeny, as elaborated in today's opinions.

I

As stated in the plurality opinion, *ante,* at 977 (O'CONNOR, J., joined by REHNQUIST, C. J., and KENNEDY, J.), this Court has thus far assumed without deciding that compliance with the results test of VRA § 2(b) is a compelling state interest. See *Shaw* v. *Hunt, ante,* at 915 *(Shaw II); Miller* v. *Johnson,* 515 U. S. 900, 920–921 (1995). Although that assumption is not determinative of the Court's decisions today, I believe that States and lower courts are entitled to more definite guidance as they toil with the twin demands of the Fourteenth Amendment and the VRA.

The results test is violated if,

> "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [*e. g.,* a racial minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b).

In the 14 years since the enactment of § 2(b), we have interpreted and enforced the obligations that it places on States in a succession of cases, assuming but never directly addressing its constitutionality. See *Johnson* v. *De Grandy,* 512 U. S. 997 (1994); *Holder* v. *Hall,* 512 U. S. 874 (1994); *Voinovich* v. *Quilter,* 507 U. S. 146 (1993); *Growe* v. *Emison,* 507 U. S. 25, 37–42 (1993); *Chisom* v. *Roemer,* 501 U. S. 380 (1991); *Thornburg* v. *Gingles,* 478 U. S. 30 (1986); cf. *Chisom,* *supra*, at 418 (KENNEDY, J., dissenting) (noting that a constitutional challenge to the statute was not before the Court). Meanwhile, lower courts have unanimously affirmed its constitutionality. See *United States* v. *Marengo County Comm'n*, 731 F. 2d 1546, 1556–1563 (CA11), cert. denied, 469 U. S. 976 (1984); *Jones* v. *Lubbock*, 727 F. 2d 364, 372–375 (CA5 1984); *Shaw* v. *Hunt*, 861 F. Supp. 408, 438 (EDNC 1994), aff'd, *Shaw II*, *ante*, p. 899; *Prosser* v. *Elections Bd.*, 793 F. Supp. 859, 869 (WD Wis. 1992); *Wesley* v. *Collins*, 605 F. Supp. 802, 808 (MD Tenn. 1985), aff'd, 791 F. 2d 1255 (CA6 1986); *Jordan* v. *Winter*, 604 F. Supp. 807, 811 (ND Miss.), aff'd *sub nom. Allain* v. *Brooks*, 469 U. S. 1002 (1984); *Sierra* v. *El Paso Independent School Dist.*, 591 F. Supp. 802, 806 (WD Tex. 1984); *Major* v. *Treen*, 574 F. Supp. 325, 342–349 (ED La. 1983); accord, Hartman, Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards, 50 Geo. Wash. L. Rev. 689, 739–752 (1982). Cf. *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966) (upholding the original VRA as a valid exercise of Congress' power under §2 of the Fifteenth Amendment); *Fullilove* v. *Klutznick*, 448 U. S. 448, 477 (1980) (*Katzenbach* and its successors interpreting §2 of the Fifteenth Amendment "confirm that congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination"); *White* v. *Alabama*, 867 F. Supp. 1519, 1549 (MD Ala. 1994) (the results test "has not been held unconstitutional and complying with it remains a strong state interest"), vacated and remanded on other grounds, 74 F. 3d 1058, 1069 (CA11 1996) (noting that "Section 2 was enacted to enforce the Fifteenth Amendment's prohibition against denying a citizen the right to vote 'on account of race' ").

Against this background, it would be irresponsible for a State to disregard the §2 results test. The Supremacy Clause obliges the States to comply with all constitutional exercises of Congress' power. See U. S. Const., Art. VI, cl. 2. Statutes are presumed constitutional, see, *e. g., Fairbank* v. *United States,* 181 U. S. 283, 285 (1901), and that presumption appears strong here in light of the weight of authority affirming the results test's constitutionality. In addition, fundamental concerns of federalism mandate that States be given some leeway so that they are not "trapped between the competing hazards of liability." *Wygant* v. *Jackson Bd. of Ed.,* 476 U. S. 267, 291 (1986) (O'CONNOR, J., concurring). We should allow States to assume the constitutionality of §2 of the VRA, including the 1982 amendments.

This conclusion is bolstered by concerns of respect for the authority of Congress under the Reconstruction Amendments. See *City of Rome* v. *United States,* 446 U. S. 156, 179 (1980). The results test of §2 is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment "to confront its conscience and fulfill the guarantee of the Constitution" with respect to equality in voting. S. Rep. No. 97–417, p. 4 (1982). Congress considered the test "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights." *Id.,* at 27. It believed that without the results test, nothing could be done about "overwhelming evidence of unequal access to the electoral system," *id.,* at 26, or about "voting practices and procedures [that] perpetuate the effects of past purposeful discrimination," *id.,* at 40. And it founded those beliefs on the sad reality that "there still are some communities in our Nation where racial politics do dominate the electoral process." *Id.,* at 33. Respect for those legislative conclusions mandates that the §2 results test be accepted and applied unless and until current lower court precedent is reversed and it is held unconstitutional.

In my view, therefore, the States have a compelling interest in complying with the results test as this Court has interpreted it.

II

Although I agree with the dissenters about § 2's role as part of our national commitment to racial equality, I differ from them in my belief that that commitment can and must be reconciled with the complementary commitment of our Fourteenth Amendment jurisprudence to eliminate the unjustified use of racial stereotypes. At the same time that we combat the symptoms of racial polarization in politics, we must strive to eliminate unnecessary race-based state action that appears to endorse the disease.

Today's decisions, in conjunction with the recognition of the compelling state interest in compliance with the reasonably perceived requirements of § 2, present a workable framework for the achievement of these twin goals. I would summarize that framework, and the rules governing the States' consideration of race in the districting process, as follows.

First, so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. See *ante,* at 958–959 (plurality opinion); *post,* at 1008–1011, and n. 8, 1025 (STEVENS, J., dissenting); *post,* at 1056, 1065, 1073 (SOUTER, J., dissenting). Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply. *Ante,* at 962, 964, 978 (plurality opinion).

Second, where voting is racially polarized, § 2 prohibits States from adopting districting schemes that would have the effect that minority voters "have less opportunity than other members of the electorate to . . . elect representatives of their choice." § 2(b). That principle may require a State to create a majority-minority district where the three *Gingles* factors are present—viz., (i) the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," (ii) "it is politically cohesive," and (iii) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," *Thornburg* v. *Gingles*, 478 U. S., at 50–51.

Third, the state interest in avoiding liability under VRA §2 is compelling. See *supra*, at 990–992; *post*, at 1033 (STEVENS, J., dissenting); *post*, at 1065 (SOUTER, J., dissenting). If a State has a strong basis in evidence for concluding that the *Gingles* factors are present, it may create a majority-minority district without awaiting judicial findings. Its "strong basis in evidence" need not take any particular form, although it cannot simply rely on generalized assumptions about the prevalence of racial bloc voting.

Fourth, if a State pursues that compelling interest by creating a district that "substantially addresses" the potential liability, *Shaw II*, *ante*, at 918, and does not deviate substantially from a hypothetical court-drawn §2 district for predominantly racial reasons, cf. *ante*, at 979 (plurality opinion) (explaining how District 30 fails to satisfy these criteria), its districting plan will be deemed narrowly tailored. Cf. *ante*, at 981 (plurality opinion) (acknowledging this possibility); *post*, at 1068 (SOUTER, J., dissenting) (same); *post*, at 1033–1035 (STEVENS, J., dissenting) (contending that it is applicable here).

Finally, however, districts that are bizarrely shaped and noncompact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, *for predominantly racial reasons*, are unconstitutional. See *ante*, at 979 (plurality opinion).

District 30 illustrates the application of these principles. Dallas County has a history of racially polarized voting. See, *e. g.*, *White* v. *Regester*, 412 U. S. 755, 765–767 (1973); *Lipscomb* v. *Wise*, 399 F. Supp. 782, 785–786 (ND Tex. 1975), rev'd, 551 F. 2d 1043 (CA5 1977), rev'd, 437 U. S. 535 (1978). One year before the redistricting at issue here, a District Court invalidated under §2 the Dallas City Council election scheme, finding racial polarization and that candidates preferred by African-American voters were consistently defeated. See *Williams* v. *Dallas,* 734 F. Supp. 1317, 1387–1394 (ND Tex. 1990). Expert testimony in this litigation also confirmed the existence of racially polarized voting in and around Dallas County. 4 Tr. 187; see also App. 227. With respect to geographical compactness, the record contains two quite different possible designs for District 30, the original Johnson Plan, *id.*, at 139, and the Owens-Pate Plan, *id.*, at 141, that are reasonably compact and include, respectively, 44% and 45.6% African-American populations. This evidence provided a strong basis for Texas' belief that the creation of a majority-minority district was appropriate. But Texas allowed race to dominate the drawing of District 30 to the almost total exclusion of nonracial districting considerations, and ultimately produced a district that, because of the misuse of race as a proxy in addition to legitimate efforts to satisfy § 2, is bizarrely shaped and far from compact. See *ante,* at 965–966, 969–973, and n. (plurality opinion); compare *post,* at 1014–1032 (Stevens, J., dissenting). It thus came under strict scrutiny and failed the narrow tailoring test.

As the disagreement among Members of this Court over District 30 shows, the application of the principles that I have outlined sometimes requires difficult exercises of judgment. That difficulty is inevitable. The VRA requires the States and the courts to take action to remedy the reality of racial inequality in our political system, sometimes necessitating race-based action, while the Fourteenth Amendment requires us to look with suspicion on the excessive use of racial considerations by the government. But I believe that the States, playing a primary role, and the courts, in their secondary role, are capable of distinguishing the appropriate and reasonably necessary uses of race from its unjustified and excessive uses.

JUSTICE KENNEDY, concurring.

I join the plurality opinion, but the statements in Part II of the opinion that strict scrutiny would not apply to all cases of intentional creation of majority-minority districts, *ante,* at 958, 962–963, require comment. Those statements are unnecessary to our decision, for strict scrutiny applies here. I do not consider these dicta to commit me to any position on the question whether race is predominant whenever a State, in redistricting, foreordains that one race be the majority in a certain number of districts or in a certain part of the State. In my view, we would no doubt apply strict scrutiny if a State decreed that certain districts had to be at least 50 percent white, and our analysis should be no different if the State so favors minority races.

We need not answer this question here, for there is ample evidence that otherwise demonstrates the predominance of race in Texas' redistricting, as the plurality shows, *ante,* at 958–976. And this question was not at issue in *DeWitt* v. *Wilson,* 856 F. Supp. 1409 (ED Cal. 1994), summarily aff'd in part and dism'd in part, 515 U. S. 1170 (1995). (I note that our summary affirmance in *DeWitt* stands for no proposition other than that the districts reviewed there were constitutional. We do not endorse the reasoning of the district court when we order summary affirmance of the judgment. *Mandel* v. *Bradley,* 432 U. S. 173, 176 (1977) *(per curiam); Edelman* v. *Jordan,* 415 U. S. 651, 671 (1974).)

On the narrow-tailoring issue, I agree that the districts challenged here were not reasonably necessary to serve the assumed compelling state interest in complying with § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973. As the plurality opinion indicates, *ante,* at 978, in order for compliance with § 2 to be a compelling interest, the State must have a strong basis in the evidence for believing that all three of the threshold conditions for a § 2 claim are met:

> "[F]irst, 'that [the minority group] is sufficiently large and geographically compact to constitute a majority in

> a single-member district'; second, 'that it is politically cohesive'; and third, 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *Growe* v. *Emison,* 507 U. S. 25, 40 (1993), quoting *Thornburg* v. *Gingles,* 478 U. S. 30, 50–51 (1986).

The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district. As the plurality observes: "If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district . . . ." *Ante,* at 979. We may assume, as the plurality does expressly, *ibid.*, that there was sufficient evidence of racial polarization to fulfill the second and third *Gingles* conditions, and we may assume, as must be done to reach the narrow-tailoring question, that the African-American and Hispanic populations in Harris County and the African-American population in Dallas County were each concentrated enough to form a majority in a reasonably compact district, thereby meeting the first *Gingles* condition.

If a State has the assumed compelling interest in avoiding § 2 liability, it still must tailor its districts narrowly to serve that interest. "[T]he districting that is based on race [must] 'substantially addres[s] the § 2 violation.'" *Ante,* at 977 (quoting *Shaw* v. *Hunt, ante,* at 918 *(Shaw II)*). The State may not engage in districting based on race except as reasonably necessary to cure the anticipated § 2 violation, nor may it use race as a proxy to serve other interests. *Ante,* at 979. The plurality gives as an example of the former the fact that "District 30 . . . reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district." *Ibid.* (referring to tentacles of District 30 that coil around outlying African-American communities in Collin and Tarrant Counties, *ante,* at 965–

966). And, as the plurality further holds in a portion of its predominant-factor analysis that is central to the narrow-tailoring inquiry, District 30 also involved the illicit use of race as a proxy when legislators shifted blocs of African-American voters to districts of incumbent Democrats in order to promote partisan interests. See *ante,* at 968–970.

Narrow tailoring is absent in Districts 18 and 29 as well. Although the State could have drawn either a majority-African-American or majority-Hispanic district in Harris County without difficulty, there is no evidence that two reasonably compact majority-minority districts could have been drawn there. Of the major alternative plans considered below, only the Owens-Pate plan drew majority-African-American and majority-Hispanic districts in Harris County, App. 142, but those districts were not compact. Section 2 does not require the State to create two noncompact majority-minority districts just because a compact district could be drawn for either minority independently. See *ante,* at 979 ("§2 does not require a State to create, on predominantly racial lines, a district that is not 'reasonably compact'"); *Johnson* v. *De Grandy,* 512 U. S. 997, 1024 (1994) (affirming, upon a finding of no vote dilution, District Court decision not to give §2 remedies to both African-Americans and Hispanics because population overlap made the remedies mutually exclusive). The race-based districting that the State performed in drawing Districts 18, 29, and 30 was not justified by §2, or indeed by any other compelling interest, either real or assumed. That itself suffices to defeat the State's claim that those three districts were narrowly tailored. *Shaw II, ante,* at 915–918. (In this respect, I disagree with the apparent suggestion in JUSTICE O'CONNOR's separate concurrence that a court should conduct a second predominant-factor inquiry in deciding whether a district was narrowly tailored, see *ante,* at 994. There is nothing in the plurality opinion or any opinion of the Court to support that proposition. The simple question is whether the race-based districting was reasonably necessary to serve a compelling interest.)

While § 2 does not require a noncompact majority-minority district, neither does it forbid it, provided that the rationale for creating it is proper in the first instance. Districts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one. States are not prevented from taking into account race-neutral factors in drawing permissible majority-minority districts. If, however, the bizarre shape of the district is attributable to race-based districting unjustified by a compelling interest (*e. g.*, gratuitous race-based districting or use of race as a proxy for other interests), such districts may "cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial," *ante*, at 980. While districts "may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests,'" *ante*, at 977, the District Court was right to declare unconstitutional the egregious, unjustified race-based districting that occurred here.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

In my view, application of strict scrutiny in this suit was never a close question. I cannot agree with JUSTICE O'CONNOR's assertion that strict scrutiny is not invoked by the intentional creation of majority-minority districts. See *ante*, at 958. Though *Shaw* v. *Reno*, 509 U. S. 630, 649 (1993) *(Shaw I)*, expressly reserved that question, we effectively resolved it in subsequent cases. Only last Term, in *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995), we vigorously asserted that all governmental racial classifications must be strictly scrutinized.[1] And in *Miller* v. *Johnson*, 515 U. S. 900 (1995), Georgia's concession that it intentionally created majority-minority districts was sufficient to show that race was a predominant, motivating factor in its redistricting. *Id.*, at 918–919.

Strict scrutiny applies to all governmental classifications based on race, and we have expressly held that there is no exception for race-based redistricting. *Id.*, at 913–915; *Shaw I*, *supra*, at 643–647. While we have recognized the evidentiary difficulty of proving that a redistricting plan is, in fact, a racial gerrymander, see *Miller*, *supra*, at 916–917; *Shaw I*, 509 U. S., at 646–647, we have never suggested that a racial gerrymander is subject to anything less than strict scrutiny. See *id.*, at 646 ("The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race").

In *Shaw I*, we noted that proving a racial gerrymander "sometimes will not be difficult at all," *ibid.*, and suggested that evidence of a highly irregular shape or disregard for traditional race-neutral districting principles could suffice to invoke strict scrutiny. We clarified in *Miller* that a plaintiff may rely on both circumstantial and direct evidence and said that a plaintiff "must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." 515 U. S., at 916. The shape of Georgia's Eleventh District was itself "quite compelling" evidence of a racial gerrymander, but there was other evidence that showed that the legislature was motivated by a "predominant, overriding desire" to create a third majority-black district. That evidence was the State's own concession that the legislature had intentionally created an additional majority-black district. See *id.*, at 918–919. On that record, we found that the District Court could not have "reached any conclusion other than that race was the predominant factor in drawing Georgia's Eleventh District." *Id.*, at 918.

---

[1] In *Adarand*, we overruled *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547 (1990), and held that strict scrutiny applies to racial classifications by the Federal Government as well as to those by the States. For quite some time, however, we have consistently held that race-based classifications by the States must be strictly scrutinized. See, *e. g.*, *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493–494 (1989) (plurality opinion); *id.*, at 520 (SCALIA, J., concurring in judgment); *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 273 (1986) (plurality opinion); *id.*, at 285 (O'CONNOR, J., concurring in part and concurring in judgment).

We have said that impermissible racial classifications do not follow inevitably from a legislature's mere awareness of racial demographics. See *id.*, at 916; *Shaw I, supra,* at 646. But the intentional creation of a majority-minority district certainly means more than mere awareness that application of traditional, race-neutral districting principles will result in the creation of a district in which a majority of the district's residents are members of a particular minority group. See *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256, 279 (1979) (distinguishing discriminatory intent from "intent as volition" or "intent as awareness of consequences"). In my view, it means that the legislature affirmatively undertakes to create a majority-minority district that would not have existed but for the express use of racial classifications—in other words, that a majority-minority district is created "because of," and not merely "in spite of," racial demographics. See *ibid.* When that occurs, traditional race-neutral districting principles are necessarily subordinated (and race necessarily predominates), and the legislature has classified persons on the basis of race. The resulting redistricting must be viewed as a racial gerrymander.

Our summary affirmance of *DeWitt* v. *Wilson,* 856 F. Supp. 1409 (ED Cal. 1994), summarily aff'd in part and dism'd in part, 515 U. S. 1170 (1995), cannot justify exempting intentional race-based redistricting from our well-established Fourteenth Amendment standard. "When we summarily affirm, without opinion, the judgment of a three-judge district court we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument." *Fusari* v. *Steinberg*, 419 U. S. 379, 391–392 (1975) (Burger, C. J., concurring) (footnote omitted). I would not read our summary affirmance of *DeWitt* to eviscerate the explicit holding of *Adarand* or to undermine the force of our discussion of Georgia's concessions in *Miller*.

In this suit, Texas readily admits that it intentionally created majority-minority districts and that those districts would not have existed but for its affirmative use of racial demographics. As the State concedes in its brief:

> "Texas intentionally maintained [District] 18 as an African-American opportunity district and intentionally created [Districts] 29 and 30 as minority opportunity districts in order to comply voluntarily with its reasonable belief, based upon strong evidence, that it was required to do so by the Voting Rights Act, and because it desired to insure that minorities who have historically been excluded from the electoral process in Texas had a reasonable opportunity to elect candidates of their choice." Brief for State Appellants 25.

See also *ante*, at 959–961, 969–970 (reciting similar concessions by Texas). That is enough to require application of strict scrutiny in this suit.[2] I am content to reaffirm our holding in *Adarand* that all racial classifications by government must be strictly scrutinized and, even in the sensitive area of state legislative redistricting, I would make no exceptions.

---

[2] It is unnecessary to parse in detail the contours of each challenged district. See *ante*, at 965–976. I agree that the geographic evidence is itself sufficient to invoke strict scrutiny, but once the State directly conceded that it intentionally used racial classifications to create majority-minority districts, there was no need to rely on circumstantial evidence.

I am willing to assume without deciding that the State has asserted a compelling state interest. Given that assumption, I agree that the State's redistricting attempts were not narrowly tailored to achieve its asserted interest. I concur in the judgment.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

The 1990 census revealed that Texas' population had grown, over the past decade, almost twice as fast as the population of the country as a whole. As a result, Texas was entitled to elect three additional Representatives to the United States Congress, enlarging its delegation from 27 to 30. Because Texas' growth was concentrated in south Texas and the cities of Dallas and Houston, the state legislature concluded that the new congressional districts should be carved out of existing districts in those areas. The consequences of the political battle that produced the new map are some of the most oddly shaped congressional districts in the United States.

Today, the Court strikes down three of Texas' majority-minority districts, concluding, *inter alia*, that their odd shapes reveal that the State impermissibly relied on predominantly racial reasons when it drew the districts as it did. For two reasons, I believe that the Court errs in striking down those districts.

First, I believe that the Court has misapplied its own tests for racial gerrymandering, both by applying strict scrutiny to all three of these districts, and then by concluding that none can meet that scrutiny. In asking whether strict scrutiny should apply, the Court improperly ignores the "complex interplay" of political and geographical considerations that went into the creation of Texas' new congressional districts, *Miller* v. *Johnson*, 515 U. S. 900, 915–916 (1995), and focuses exclusively on the role that race played in the State's decisions to adjust the shape of its districts. A quick comparison of the unconstitutional majority-minority districts with three equally bizarre majority-Anglo districts, compare *ante*, at Appendixes A–C, with *infra*, at Appendixes A–C, demonstrates that race was not necessarily the predominant factor contorting the district lines. I would follow the fair implications of the District Court's findings,[1] and conclude that Texas' entire map is a political, not a racial, gerrymander.[2] See Part IV, *infra*.

Even if strict scrutiny applies, I would find these districts constitutional, for each considers race only to the extent necessary to comply with the State's responsibilities under the Voting Rights Act while achieving other race-neutral political and geographical requirements. The plurality's finding to the contrary unnecessarily restricts the ability of States to conform their behavior to the Voting Rights Act while simultaneously complying with other race-neutral goals. See Part V, *infra*.

Second, even if I concluded that these districts failed an appropriate application of this still-developing law to appropriately read facts, I would not uphold the District Court decision. The decisions issued today serve merely to reinforce my conviction that the Court has, with its "analytically distinct" jurisprudence of racial gerrymandering, *Shaw* v. *Reno*, 509 U. S. 630, 652 (1993) *(Shaw I)*, struck out into a jurisprudential wilderness that lacks a definable constitutional core and threatens to create harms more significant than any suffered by the individual plaintiffs challenging these districts. See Parts VI–VII, *infra; Shaw* v. *Hunt*, *ante*, at 918–919 *(Shaw II)* (STEVENS, J., dissenting). Though we travel ever farther from it with each passing decision, I would return to the well-traveled path that we left in *Shaw I*.

---

[1] The District Court recognized, but erroneously ignored, the overwhelming weight of evidence demonstrating that political considerations dominated the shaping of Texas' congressional districts. See *Vera* v. *Richards*, 861 F. Supp. 1304, 1331, 1334–1336 (SD Tex. 1994); *infra*, at 1027–1029.

[2] Because I believe that political gerrymanders are more objectionable than the "racial gerrymanders" perceived by the Court in recent cases, see *Karcher* v. *Daggett*, 462 U. S. 725, 748 (1983) (STEVENS, J., concurring); *Davis* v. *Bandemer*, 478 U. S. 109, 161–162, 166 (1986) (Powell, J., concurring in part and dissenting in part), I am not entirely unsympathetic to the Court's holding. I believe, however, that the evils of political gerrymandering should be confronted directly, rather than through the race-specific approach that the Court has taken in recent years. See also *infra*, at 1038–1040.

I

The factors motivating Texas' redistricting plan are clearly revealed in the results of the 1992 elections. Both before and immediately after the 1990 census, the Democratic Party was in control of the Texas Legislature. Under the new map in 1992, more than two-thirds of the Districts—including each of the new ones—elected Democrats, even though Texas voters are arguably more likely to vote Republican than Democrat.[3] Incumbents of both parties were just as successful: 26 of the 27 incumbents were reelected, while each of the three new districts elected a state legislator who had essentially acted as an incumbent in the districting process,[4] giving "incumbents" a 97% success rate.

---

[3] In elections since 1980, the State has elected a Democrat in only two of four gubernatorial races, and in only two of six races for the United States Senate. America Votes 21: A Handbook of Contemporary American Election Statistics 417 (R. Scammon & A. McGillivray eds. 1995). Furthermore, in 1994, Republican candidates received a total of 550,000 more votes than Democratic candidates in Texas' 30 races for the United States House of Representatives, *id.*, at 4, while in 1992, Democratic House candidates outpolled Republicans by only 147,000 votes (despite winning 27 of 30 districts). America Votes 20: A Handbook of Contemporary American Election Statistics 474 (R. Scammon & A. McGillivray eds. 1993).

[4] Then-State Senator from Dallas, Eddie Bernice Johnson, who was chair of the Senate Subcommittee on Congressional Districts, maneuvered to construct District 30 in a manner that would ensure her election. 861

It was not easy for the State to achieve these results while simultaneously guaranteeing that each district enclosed the residence of its incumbent, contained the same number of people, and complied with other federal and state districting requirements. Much of Dallas and Houston, for example, was already represented in Congress by Democrats, and creating new Democratic districts in each city while ensuring politically safe seats for sitting Representatives required significant political gerrymandering. This task was aided by technological and informational advances that allowed the State to adjust lines on the scale of city blocks, thereby guaranteeing twists and turns that would have been essentially impossible in any earlier redistricting.[5] "[T]he result of the Legislature's efforts," the District Court concluded, was "a

---

F. Supp., at 1313; Politics in America 1994: The 103rd Congress 1536 (1993) ("This is the District Eddie Bernice Johnson drew"). Vice chair of the same committee, Frank Tejeda, also "attempted to draw a district [District 28] that would facilitate his potential candidacy." 861 F. Supp., at 1326. And State Senator Gene Green and State Representative Roman Martinez, both Houston-area officials with designs on Congress, competed in an effort to design District 29 in a way that would guarantee their own election. *Id.*, at 1324, n. 27. (Martinez later dropped out of the congressional race to run for State Senate.) Because the role that these legislators played in the redistricting process was largely identical to that played by sitting incumbents, my references to the role of "incumbents" in the redistricting process generally refer to these individuals as well.

[5] As did many other States, Texas kept track of the shapes of its post-1990 districts with a computer districting program loaded with 1990 census information and geographic information at scales ranging from statewide to that of a city block. See generally *Shaw* v. *Hunt*, 861 F. Supp. 408, 457 (EDNC 1994) (describing computer programs); 861 F. Supp., at 1318–1319. The dramatic increase in bizarrely shaped districts after 1990 can be traced, at least in part, to the fact that computers allowed legislators to achieve their political goals geographically in a manner far more precise than heretofore possible. See Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 574 (1993); Note, The Illegitimacy of the Incumbent Gerrymander, 74 Texas L. Rev. 913, 924 (1996).

crazy-quilt of districts" that bore little resemblance to "the work of public-spirited representatives." *Vera* v. *Richards*, 861 F. Supp. 1304, 1309 (SD Tex. 1994); see, *e. g.*, Appendixes A–D.

It is clear that race also played a role in Texas' redistricting decisions. According to the 1990 Census, Texas contained 16,986,510 residents, of whom 22.5% were of Hispanic origin, and 11.6% were non-Hispanic African-American. 861 F. Supp., at 1311. Under the pre-1990 districting scheme, Texas' 27-member delegation included four Hispanics and one African-American. In Harris County, a concentrated Hispanic community was divided among several majority-Anglo districts as well as the majority-minority District 18. In Dallas County, the majority-black community in South Dallas was split down the middle between two majority-Anglo districts. The legislature was well aware, after the 1990 census, that the minority communities in each county were disproportionately responsible for the growth in population that gained three representatives for the State. Given the omnipresence of § 2 of the Voting Rights Act, 42 U. S. C. § 1973, the demographics of the two communities, and the pressure from leaders of the minority communities in those cities, it was not unreasonable—and certainly not invidious discrimination of any sort—for the State to accede to calls for the creation of majority-minority districts in both cities.[6]

---

[6] The State added District 28 (a majority-Hispanic district in south Texas), District 29 (a majority-Hispanic district in Houston), and District 30 (a majority-black district in Dallas). In addition, the State reconfigured Houston's District 18. That district had elected African-American Representatives to Congress since the early 1970's and remained majority-minority in 1990, although a plurality of its population was by then Hispanic. To create District 29, the legislature altered the shape of District 18 to move parts of its Hispanic population into that neighboring district while retaining a majority-black population.

To the extent that the precise shape of these districts relied on race rather than other factors, that racial gerrymandering was somewhat less

While complying with a multitude of other political and legal requirements, then, Texas created three new majority-minority congressional districts and significantly reconfigured one pre-existing district. The District Court concluded that the State impermissibly emphasized race over nonracial factors when it drew two of these new districts (District 30 in Dallas and District 29 in Houston) and the reconfigured District 18 in Houston. To determine whether the Court correctly affirms that decision, I begin, as does the plurality, by asking whether "strict scrutiny" should be applied to the State's consideration of race in the creation of these majority-minority districts.

II

We have traditionally applied strict scrutiny to state action that discriminates on the basis of race. Prior to *Shaw I*, however, we did so only in cases in which that discrimination harmed an individual or set of individuals because of their race. In contrast, the harm identified in *Shaw I* and its progeny is much more diffuse. See *Shaw II, ante,* at 921–925 (STEVENS, J., dissenting). Racial gerrymandering of the sort being addressed in these cases is "discrimination" only in the sense that the lines are drawn based on race, not in the sense that harm is imposed on specific persons on account of their race. *Ante,* at 923–924 (STEVENS, J., dissenting).

Aware of this distinction, a majority of this Court has endorsed a position crucial to a proper evaluation of Texas' congressional districts: Neither the Equal Protection Clause nor any other provision of the Constitution was offended merely because the legislature considered race when it deliberately

---

effective than the political gerrymandering had been: District 29, created as a majority-Hispanic district, elected an Anglo, former State Senator Green, in 1992, and reelected him in 1994. America Votes 21, at 437. Given his substantial role in crafting the district to meet his electoral needs, see n. 4, *supra,* Green's success suggests the power of incumbency over race.

created three majority-minority districts.[7] The plurality's statement that strict scrutiny "does [not] apply to all cases of intentional creation of majority-minority districts," *ante*, at 958, merely caps a long line of discussions, stretching from *Shaw I* to *Shaw II*, which have both expressly and implicitly set forth precisely that conclusion.[8]

---

[7] I do not agree with the Court's approach to these cases. Nonetheless, given that the Court seems settled in its conclusion that racial gerrymandering claims such as these may be pursued, I endorse this proposition.

[8] Though expressly reserving the issue in *Shaw I*, we noted there that appellants wisely conceded that while "race-conscious redistricting is not always unconstitutional. . . . This Court has never held that race-conscious state decisionmaking is impermissible in *all* circumstances." 509 U. S., at 642 (emphasis in original). The threshold test for the application of strict scrutiny as set forth in *Miller* v. *Johnson*, 515 U. S. 900 (1995), implicitly accepts this as true, concluding that strict scrutiny applies not when race merely *influences* the districting process, but only when "the legislature *subordinated* traditional race-neutral districting principles . . . to racial considerations." *Id.*, at 916 (emphasis added); see also *id.*, at 928–929 (O'CONNOR, J., concurring) (test does not "throw into doubt the vast majority of the Nation's 435 congressional districts . . . even though race may well have been considered in the redistricting process"). *Shaw II* similarly recognizes that intent does not trigger strict scrutiny: Although the District Court concluded that the State "deliberately drew" the district in question to ensure that it included a majority of African-American citizens, see *Shaw*, 861 F. Supp., at 473; *Shaw II*, *ante*, at 905, the Court reviews the District Court's findings regarding the demographics of the district to determine whether the strict scrutiny was appropriately applied. See *ante*, at 905–906; cf. *ante*, at 999 (THOMAS, J., concurring in judgment) (where State intends to create majority-minority district, application of strict scrutiny not even a "close question").

JUSTICE THOMAS takes a strong view on this matter, arguing that a majority-minority district should escape strict scrutiny only when it is created "in spite of," not "because of," the race of its population. *Ante*, at 1001. But because minorities are, by definition, minorities in the population, it will be rare indeed for a State to stumble across a district in which the minority population is both large enough and segregated enough to allow majority-minority districts to be created with at most a "mere awareness" that the placement of the lines will create such a district. See *ibid.* Indeed, I doubt that any such district exists in the entire Nation; the creation of even the most compact majority-minority district will gen-

The conclusion that race-conscious districting should not always be subject to strict scrutiny merely recognizes that our equal protection jurisprudence can sometimes mislead us with its rigid characterization of suspect classes and levels of scrutiny. As I have previously noted, all equal protection jurisprudence might be described as a form of rational basis scrutiny; we apply "strict scrutiny" more to describe the likelihood of success than the character of the test to be applied. See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 452–453 (1985) (STEVENS, J., concurring). Because race has rarely been a legitimate basis for state classifications, and more typically an irrational and invidious ground for discrimination, a "virtually automatic invalidation of racial classifications" has been the natural result of the application of our equal protection jurisprudence. *Id.*, at 453. In certain circumstances, however, when the state action (i) has neither the intent nor effect of harming any particular group, (ii) is not designed to give effect to irrational prejudices held by its citizens but to break them down, and (iii) uses race as a classification because race is "relevant" to the benign goal of the classification, *id.*, at 454, we need not view the action with the typically fatal skepticism that we have used to strike down the most pernicious forms of state behavior. See *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267,

---

erally require a conscious decision to draw its lines "just so" to ensure that the group is not a minority in the district population. It appears, however, that even when a district is placed "just so" in order to include a traditional community in which race does correlate with community interests (consider, for example, New York District 15, which is centered on Harlem), JUSTICE THOMAS would review that district with the same presumption of invidiousness with which we viewed the district in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). Cf. *Miller*, 515 U. S., at 944 (GINSBURG, J., dissenting) (noting that "ethnicity itself can tie people together" in communities of interest). Because the creation of such a district threatens neither the harms of *Gomillion* nor, I believe, any harms against which the Fourteenth Amendment was intended to protect, I cannot accept his conclusion.

316–317 (1986) (STEVENS, J., dissenting); *Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265, 320 (1978). While the Court insisted in *Shaw I* that racial classifications of this sort injure the Nation (though not necessarily any particular group) in myriad ways, see 509 U. S., at 647–648, redistricting that complies with the three factors I outline above simply is not the sort of despicable practice that has been taken in the past to exclude minorities from the electoral process. See *Shaw II, ante,* at 931–933 (STEVENS, J., dissenting); *Shaw I,* 509 U. S., at 682–685 (SOUTER, J., dissenting); cf., *e. g., Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960); *Terry* v. *Adams,* 345 U. S. 461 (1953). While any racial classification may risk some stereotyping, the risk of true "discrimination" in this case is extremely tenuous in light of the remedial purpose the classification is intended to achieve and the long history of resistance to giving minorities a full voice in the political process. Given the balancing of subtle harms and strong remedies—a balancing best left to the political process, not to our own well-developed but rigid jurisprudence—the plurality reasonably concludes that race-conscious redistricting is not always a form of "discrimination" to which we should direct our most skeptical eye.

III

While the Court has agreed that race can, to a point, govern the drawing of district lines, it nonetheless suggests that at a certain point, when the State uses race "too much," illegitimate racial stereotypes threaten to overrun and contaminate an otherwise legitimate redistricting process. In *Miller,* the Court concluded that this point was reached when "race for its own sake, and not other districting principles, was the . . . dominant and controlling rationale" behind the shape of the district. 515 U. S., at 913. For strict scrutiny to apply, therefore, the plaintiff must demonstrate that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, [and] respect for political subdivisions . . . to racial considerations." *Id.*, at 916; see also *id.*, at 928 (O'CONNOR, J., concurring) (strict scrutiny should be applied only if State emphasized race in "substantial disregard" for traditional districting principles); *ante*, at 962 (opinion of O'CONNOR, J.).

Of course, determining the "predominant" motive of the Texas Legislature, *ante*, at 959 (citing *Miller*, 515 U. S., at 916), is not a simple matter.[9] The members of that body faced many unrelenting pressures when they negotiated the creation of the contested districts. They had to ensure that there was no deviation in population from district to district.[10] They reasonably believed that they had to create districts that would comply with the Voting Rights Act. See *supra,* at 1007. If the redistricting legislation was to be enacted, they had to secure the support of incumbent Congressmen of both parties by drawing districts that would ensure their election. And all of these desires had to be achieved within a single contiguous district. Every time a district line was shifted from one place to another, each of these considerations was implicated, and additional, compensating shifts were necessary to ensure that all competing goals were simultaneously accomplished. In such a constrained environment, there will rarely be one "dominant and controlling" influence. Nowhere is this better illustrated

---

[9] Because the Court's approach to cases of this kind seeks to identify the "predominant" motive of the legislature, it is worth pointing out, as we have on so many prior occasions, that it is often "difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators." *Palmer* v. *Thompson*, 403 U. S. 217, 225 (1971). As in every other legislative body, each of the members of Texas' Legislature has his or her own agenda and interests—particularly in the "complicated process" of redistricting, in which every decision "inevitably has sharp political impact." *White* v. *Weiser*, 412 U. S. 783, 795–796 (1973). In these circumstances, "[r]arely can it be said that a legislature . . . operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators . . . are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality." *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265 (1977) (footnote omitted); see also *Edwards* v. *Aguillard*, 482 U. S. 578, 636–639 (1987) (SCALIA, J., dissenting); *Shaw II*, *ante*, at 940 (STEVENS, J., dissenting).

Not only is this a case in which a legislature is operating under a "broad mandate," but other factors weigh in favor of deference as well. First, the inherently political process of redistricting is as much at the core of state sovereignty as any other. Second, the "motive" with which we are concerned is not *per se* impermissible. (For that reason, this litigation is very different from *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989), and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), in which the plaintiffs alleged that the defendant's action was motivated by an intent to harm individuals because of their status as members of a particular group. Where there is "proof that a discriminatory purpose has been a motivating factor in the decision," the "judicial deference" due to the legislative process is no longer justified. *Id.*, at 265–

266.) Finally, those that are injured by the allegedly discriminatory districts can alleviate their injury through the democratic process: Those in the district could elect a representative who is not a part of their racial group, while the population at large could elect a legislature that refused to rely on racial considerations in the drawing of districts. In such circumstances we should take particular care in questioning the legislature's motives and, if in doubt, presume that the legislature has acted appropriately. See *post,* at 1058–1062 (SOUTER, J., dissenting).

[10] We require state legislatures to ensure that populations, from district to district, are "as mathematically equal as reasonably possible," with *de minimis* exceptions permissible only in "unavoidable" instances. *White* v. *Weiser,* 412 U. S., at 790; see also *Karcher,* 462 U. S., at 734–735. Population variances are not permissible even "'if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing . . . political subdivision boundaries.'" *White,* 412 U. S., at 791 (citing *Kirkpatrick* v. *Preisler,* 394 U. S. 526, 533–534 (1969)). The legislature, therefore, understandably felt compelled to achieve mathematical equality regardless of other concerns. Rather surprisingly, they were able to do so: Every one of Texas' 30 congressional districts contains precisely 566,217 persons. Of course, this precision could not have been accomplished without breaking apart counties, cities, neighborhoods, and even pre-existing voting precincts.

than in Dallas' District 30 where, at the very least, it is clear that race was *not* such an overriding factor.

IV

The plurality lists several considerations which, when taken in combination, lead it to conclude that race, and no other cause, was the predominant factor influencing District 30's configuration. First, there is the shape itself. Second, there is evidence that the districts were intentionally drawn with consciousness of race in an effort to comply with the Voting Rights Act. Third, the plurality dismisses two race-neutral considerations (communities of interest and incumbency protection) that appellants advanced as race-neutral considerations that led to the odd shape of the districts. Finally, the plurality concludes that race was impermissibly used as a proxy for political affiliation during the course of redistricting. In my opinion, an appropriate reading of the record demonstrates that none of these factors—either singly or in combination—suggests that racial considerations "subordinated" race-neutral districting principles. I discuss each in turn.

Bizarre Shape

As noted, *supra,* at 1003, and n. 6, Texas' Legislature concluded that it would add a new district to Dallas County that would incorporate the rapidly growing minority communities in South Dallas. To do so, the new district would have to fit into the existing districts: Before redistricting, most of southern Dallas County (including the African-American communities in South Dallas) was divided between Districts 5 and 24, represented by Democratic Representatives Bryant and Frost, respectively. The middle of the northern section of the county was divided between Districts 3 and 26, both represented by Republicans.

Then-State Senator Johnson began the redistricting process by proposing a compact, Democratic, majority-minority district encompassing all of South Dallas. See App. 139; 861 F. Supp., at 1321, n. 22. Representatives Bryant and Frost objected, however, because the proposed district included not only Johnson's residence, but their own homes, located within only 10 miles of each other on opposite sides of the city. Furthermore, Johnson's plan transferred many of Frost and Bryant's most reliable Democratic supporters into the proposed district. Rather than acquiesce to the creation of this compact majority-minority district, Frost and Bryant insisted that the new district avoid both their own homes and many of the communities that had been loyal to them. Johnson's plan was, therefore, "quickly abandoned." *Ibid.*

To accommodate the incumbents' desires, District 30 required geographical adjustments that had telling effects on its shape. First, two notches carefully avoiding the residences of and neighborhoods surrounding Frost and Bryant were carved out of District 30's side. See Appendix D, *infra.*[11] Furthermore, Frost and Bryant retained several communities—many majority-black—along the southern and eastern sides of the proposed district. See generally 861 F. Supp., at 1321–1322.[12]

---

[11] This phenomenon is not unique to Dallas County: Throughout the State, "incumbent residences repeatedly fall just along district lines." 861 F. Supp., at 1318 (giving examples); see State's Exhs. 10A and 10B (showing incumbent residences). District 6, for instance, changed from a rural district stretching far to the southeast of Dallas to a more suburban district wrapping around Fort Worth. As it did so, however, the district pivoted around the home of incumbent Representative Joe Barton, whose residence sits at the extreme southeastern end of a district stretching in a 100-mile-long loop around Fort Worth. See Appendix D, *infra.*

[12] The plurality suggests that these communities were shed from District 30 in a "suspect use of race as a proxy to further neighboring incumbents' interests." *Ante,* at 979; see also *ante,* at 971–972, n. I had thought, however, that the Court's concern in these cases was the "resemblance to political apartheid" involved in the creation of majority-minority districts. *Shaw I,* 509 U. S. 630, 647 (1993). I do not see how the decision to *include* minority communities in a neighboring majority-white district bears any resemblance to such "apartheid" or, for that matter, how it has any rele-

Had these communities been retained by District 30, it would have been much more compact. By giving up these voters to Frost and Bryant, however, District 30 was forced to seek out population and Democratic voters elsewhere. The Democratic incumbents had blocked its way to the south and east; north (and, to a lesser extent, west) was the only way it could go.[13]

It would not have helped the prospects of a Democratic candidate in the new District 30 had it simply plowed directly north to pick up additional population. Immediately north of the city of Dallas are the "Park Cities," which include a population that has voted strongly Republican throughout recent elections. See State's Exhs. 9A and 9B (depicting one index of political affiliation in 1990 and 1992 elections). Rather than dilute the Democratic vote (and threaten the Republican incumbents) in this manner, District 30 skirted these communities on the west, and then curved east, picking up communities on either side of the region's major interstate freeways.[14]

As the process of extracting Democratic voters out of the core of the Republican districts in North Dallas progressed, the distinction between Democratic and Republican voters moved from the precinct level (the smallest level at which political affiliation data was immediately available in the re-

---

vance to the validity of the creation of a district from which those minority communities have been excluded. See also *infra,* at 1030–1032.

[13] See, *e. g.,* 3 Tr. 187 (testimony of Christopher Sharman: "[A]ny time you took part of a district away on one end, you would usually squeeze or push the district out on another end; and in this case, most of the time the district would get pushed to the north").

[14] The author of the District Court opinion was herself aware of these political realities. See *id.,* at 194 (Jones, J., noting that Johnson did not want anything to do with the Park Cities because she "[d]idn't want competition from Ross Perot"). In light of this recognition, it is difficult to understand why the District Court described District 30's efforts to avoid that community as a contributing factor to the allegedly race-based bizarreness of the district borders. See 861 F. Supp., at 1337; *ante,* at 967.

districting programs) down to the smaller census block level (the smallest level at which demographic and socioeconomic data was available).[15] In an effort to further identify which census blocks were likely to support their candidacy, the incumbents used not only census data, but their own long experience as local representatives as well as the experiences of staffers and supporters. See 3 Tr. 177–179, 181–182 (describing methods, such as simply driving through neighborhoods, that staff members and candidates for office used to develop block-specific information regarding the likely political affiliation of voters).[16]

In addition, although information about political affiliation was not available at the block level through the computer program, legislators and staffers were able to get relatively precise information about voter preferences through a system, developed by the Democratic Party, that allowed candidates to determine in which party primary voters had participated. *Id.*, at 179–180. By examining this information, legislators were able to further fine-tune district lines to include likely supporters and exclude those who would probably support their opponents. Cf. *Gaffney* v. *Cummings,* 412 U. S. 735, 753 (1973) ("[W]hen [political profiles are] overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another").[17]

---

[15] Because political boundaries are more closely packed in urban than in rural areas, drawing lines based on such boundaries will almost always require tighter twists and turns in urban districts than in rural districts. Significantly, the three districts struck down by the District Court are the only three districts in the entire State with population densities of over 2,000 persons per square mile. See U. S. Dept. of Commerce, Bureau of the Census, Population and Housing Characteristics for Congressional Districts of the 103d Congress: Texas 40–44 (Feb. 1993). If enough empty land were added to these districts that they matched the sparse densities of rural districts (such as District 28, which was upheld by the District Court), their turns would not appear so sharp, and the open space, without its demographic implications, could smooth the deepest of the districts' notches.

[16] As Democratic communities were identified, they had to be connected with the core of the district. Although Texas has no state statutory or constitutional requirement to that effect, state legislators agreed that each of the 30 districts should be entirely contiguous, permitting any candidate, map in hand, to visit every residence in her district without leaving it.

The careful gerrymandering conducted by the Texas Legislature under the watchful eye of Johnson and her staff was a success not only on a districtwide level (Johnson was elected with over 70% of the vote in both 1992 and 1994), but on a precinct level. While the pre-1990 precincts in the heavily Republican North Dallas gave little reason for a Democratic incumbent to hope for much support, see State's Exh. 9B (maps of Dallas and Collin Counties with 1990 election index results showing only a few Democrat-leaning precincts in North Dallas), the gerrymandering that occurred in 1991 resulted in smaller precincts that, by all indications, gathered concentrations of Democratic voters into District 30 while leaving concentrations of Republican voters in surrounding Districts 3 and 26. See State's Exh. 9A (maps of Dallas and Collin Counties with 1992 election index results showing many more Democrat-leaning precincts in the North Dallas sections of District 30).

Presumably relying on *Shaw I*'s statement that "a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race," 509

---

[17] Incumbents influenced the shape of districts in other ways. Both District 30 and District 29, for instance, detoured to include portions of the state legislative districts that were being represented by the state legislators who hoped to run for Congress. See, *e. g.,* State's Exh. 31 (showing that portion of Tarrant County included in District 30 had been part of Johnson's State Senate district). In some cases, legislators drew districts to avoid the residences of potential primary challengers. See 3 Tr. 192–193; 4 *id.,* at 46. Incumbents also sought to include communities that they expected (or knew) to contain particularly active supporters; this interest in "active" voters often trumped any desire to ensure a particular racial makeup. See 3 *id.,* at 190; 4 *id.,* at 40–41; 861 F. Supp., at 1320.

U. S., at 646–647, the plurality offers mathematical proof that District 30 is one of the most bizarre districts in the Nation, see *ante*, at 960, and relates the now-obligatory florid description of the district's shape, *ante*, at 965–966; see also *ante*, at 973–974 (describing District 29). As the maps appended to this opinion demonstrate, neither District 30 nor the Houston districts have a monopoly on either of these characteristics. Three other majority-white districts are ranked along with the majority-minority districts as among the oddest in the Nation. See Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 565 (1993). Perhaps the clearest example of partisan gerrymandering outside of the context of majority-minority districts is District 6, a majority-Anglo district represented by a Republican.[18]

---

[18] While two extremely noncompact majority-Anglo districts in Texas (Districts 3 and 25) might be able to blame part (though by no means all) of their contortions on their contiguity with the majority-minority districts, District 6 has little excuse. Although it shares a border with District 30 for a short distance, that stretch is one of the straightest in either of the districts, running almost entirely along the county line through the Dallas-Fort Worth International Airport. See Appendix D, *infra.*

As for the obligatory florid description: District 6 has far less of an identifiable core than any of the majority-minority districts struck down by the District Court. To the extent that it "begins" anywhere, it is probably near the home of incumbent Rep. Barton in Ennis, located almost 40 miles southwest of downtown Dallas. From there, the district winds across predominantly rural sections of Ellis County, finally crossing into Tarrant County, the home of Fort Worth. It skips across two arms of Joe Pool Lake, noses its way into Dallas County, and then travels through predominantly Republican suburbs of Fort Worth. Nearing the central city, the borders dart into the downtown area, then retreat to curl around the city's northern edge, picking up the airport and growing suburbs north of town. Worn from its travels into the far northwestern corner of the county (almost 70 miles, as the crow flies, from Ennis), the district lines plunge south into Eagle Mountain Lake, traveling along the waterline for miles, with occasional detours to collect voters that have built homes along its shores. Refreshed, the district rediscovers its roots in rural Parker

For every geographic atrocity committed by District 30, District 6 commits its own and more. District 30 split precincts to gerrymander Democratic voters out of Republican precincts; District 6 did the same. See State's Exh. 9B (Tarrant County, showing District 6 cuts). District 30 travels down a riverbed; District 6 follows the boundaries of a lake. District 30 combines various unrelated communities of interest within Dallas and its suburbs; District 6 combines rural, urban, and suburban communities. District 30 sends tentacles nearly 20 miles out from its core; District 6 *is* a tentacle, hundreds of miles long (as the candidate walks), and it has no core.

The existence of the equally bizarre majority-white District 6 makes the plurality's discussion of District 30's odd shape largely irrelevant. If anything, the similarities between Districts 6 and 30 suggest that it is more likely than not that the incumbency considerations that led to the mutation of District 6 were the same considerations that forced District 30 to twist and turn its way through North Dallas.[19]

County, then flows back toward Fort Worth from the southwest for another bite at Republican voters near the heart of that city. As it does so, the district narrows in places to not much more than a football field in width. Finally, it heads back into the rural regions of its fifth county—Johnson—where it finally exhausts itself only 50 miles from its origin, but hundreds of "miles apart in distance and worlds apart in culture." *Miller*, 515 U. S., at 908 (describing a similar combined rural/urban district).

[19] Seeking specific examples, the plurality makes much hay over a portion of Collin County located just over the county line north of Dallas. See *ante*, at 965, 971. There, District 30 excludes a portion of a precinct that voted Democratic in 1990, and maps "*exactly* onto the only area in the southern half of th[e] county with a [minority] percentage population in excess of 50%." *Ante*, at 965.

The map to which the plurality refers, however, groups the minority percentage by precinct, and since precincts are defined by the district boundaries, it is no surprise that the district maps "exactly" onto the precinct. See App. 153. (One might similarly argue that "District 30 maps *exactly* onto the only area in all of north Texas that is 50% black," but such a statement reveals little about the underlying demographics of spe-

The political, rather than the racial, nature of District 30's gerrymander is even more starkly highlighted by comparing it with the districts struck down in *Shaw II* and *Miller*. District 30's black population is, for instance, far more concentrated than the minority population in North Carolina's District 12. And in *Miller*, the Court made it clear that the odd shape of Georgia's Eleventh District was the result of a conscious effort to *increase* its proportion of minority populations: It was, the Court found, "'exceedingly obvious' from the shape of the Eleventh District, together with the racial demographics, that the drawing of narrow land bridges to incorporate within the district outlying appendages containing *nearly 80%* of the district's total black population was a deliberate attempt to bring black populations into the district." *Miller*, 515 U. S., at 917 (emphasis added; citation omitted).

District 30 is the precise demographic *converse* of the district struck down in *Miller*. District 30, for example, has a compact core in South Dallas which contains 50% of the district population and *nearly 70%* of the district's total black population. Cf. *ibid*. Unlike the appendages to Georgia's District 11, the tentacles stretching north and west

---

cific sections of the district.) The more telling maps are the census block maps, which demonstrate that the Collin County section of District 30 contains many more *census blocks* of less than 25% minority population than it does blocks that are more than 50% minority. See State's Exhs. 45 and 46 (Exh. 45 is reproduced, in part, as Appendix D, *infra*). Even if those majority-white blocks have relatively small populations, they were nonetheless included, suggesting that the creation of the district was not as single-mindedly focused on race as the Court and the District Court assume.

Even more significant is the fact that the new precinct leaned overwhelmingly Democratic in the 1992 election, while the portion of the precinct that was not included in District 30 voted overwhelmingly Republican. See State's Exh. 9B (Collin County). While the excluded portion of the 1990 precinct may have been dropped, in part, to help comply with the State's goals under the Voting Rights Act, it also involved a successful effort to maximize Democratic votes while avoiding Republican votes.

from District 30 add progressively less in the way of population, and, more important for purposes of this inquiry, they actually *reduce* the proportional share of minorities in the district. See State's Exh. 33.

For example: The worst offender, in the trained eye of the Court, may be the northern arm of the district that winds around the Park Cities and then up into Collin County. But that arm, which contains 22% of the population, is only 21% black, *ibid.*—a proportion essentially identical to the proportion of African-Americans in Dallas County as a whole.[20]

The plurality is certainly correct in pointing out that District 30's outlying reaches encompass some communities with high concentrations of minorities.[21] It is implausible to suggest, however, that an effort to "segregate" voters drove District 30 to collect those populations. After all, even the District Court noted that African-American voters immediately adjacent to the core of District 30 were intentionally *excluded* from the district "*in order to protect incumbents.*" 861 F. Supp., at 1339 (emphasis added). Forced into Republican territory to collect Democratic votes, the district intentionally picked up some minority communities (though far more majority-white communities). If it had not, the goal of creating a majority-black district would have been sacrificed to incumbency protection (the very sort of "predominance" of race over race-neutral factors that the plurality discredits). But unlike Georgia's District 11 and North Carolina's District 12, the *reason* that the district was there in the first place was not to collect minority communities, but to collect population—preferably Democrats. It would, therefore, be fanciful to assert that the "several appendages" to District 30 were "drawn for the obvious," let alone the *predominant*, "purpose of putting black populations into the district." *Miller*, 515 U. S., at 910.[22]

---

[20] See 861 F. Supp., at 1312 (black population in Dallas County is 362,130); Bureau of Census, Population and Housing Unit Counts 185 (Oct. 1993) (total population of Dallas County is 1,852,810).

[21] Several responses to the plurality's specific examples are worth making, however. In Collin County, the plurality relies on the fact that the "combined African-American and Hispanic" population in the Collin County extremity of the northern appendage to District 30 is in excess of 50%. *Ante,* at 971. But District 30 was created with an eye to a majority-*black* population, rather than a majority-minority population, so the more relevant facts are that (i) African-Americans make up only 19.8% of the Collin County appendage, App. 331, (ii) those African-Americans consist of only two-tenths of 1% of the entire population in the district, *ibid.*, and (iii) this appendage contains more *majority-white* census blocks than it does majority-minority census blocks, see State's Exh. 45.

The plurality also points out that a small portion of one of the tentacles—the one that extends west into Tarrant County—contains an African-American majority. *Ante,* at 965. It would be implausible to claim, however, that race was the "predominant" reason that this community was included in District 30. First, the community had been part of Senator Johnson's state legislative district, see n. 17, *supra;* second, it also includes majority-white census blocks; and third, the *total* population in that portion of the district is less than 2,000 people. App. 331. Finally, and more important, the population of the entire western tentacle (at the tip of which is the Tarrant County community) is only 29% black, see State's Exh. 33—less than half the proportion of minorities in the core of the district.

In sum, a fair analysis of the shape of District 30, like the equally bizarre shape of District 6, belies the notion that its shape was determined by racial considerations.

---

[22] Indeed, if the "appendages" to District 30 reaching into neighboring counties were cut off, the proportion of African-Americans in the resulting district would actually *increase*. See App. 331. As presently constituted, District 30 includes 566,217 people, of which 283,225 (or 50.02%) are African-American. If the Tarrant County and Collin County portions of the district were removed, the resulting district would have 557,218 people, of which 280,620 (or 50.36%) would be African-American. While the resulting district would not include the "zero deviation" necessary under *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and its progeny, see n. 10, *supra*, the missing population could easily be acquired in majority-black census blocks adjacent to District 30's southern and eastern edge, thereby increasing the proportion of black population still further. Because the alleged racial goals of the district could be achieved *more* effectively by making the district *more* compact, I simply do not comprehend how the plurality can conclude that the effort to create a majority-minority district "predominated" over other, race-neutral goals.

Intent

Perhaps conscious that noncompact congressional districts are the rule rather than the exception in Texas, the plurality suggests, *ante,* at 960–961, 969–970, that the real key is the direct evidence, particularly in the form of Texas' § 5 Voting Rights Act submissions and the person of then-State Senator Johnson, that the State expressed an intent to create these districts with a given "minimum percentage of the favored minority." 861 F. Supp., at 1309. Even if it were appropriate to rest this test of dominance on an examination of the subjective motivation of individual legislators,[23] or on

---

[23] Testimony by individuals is relevant, but hardly dispositive evidence of collective motivations. See n. 9, *supra.* It may be true that the most important concern motivating Senator Johnson, the Chairman of the Senate Districting Committee, was her desire to create the first Congressional District in the history of the State in which African-Americans were in the majority. Johnson never testified, however, that racial considerations were the *sole* concern motivating the changes to the shapes of the districts. See, *e. g.,* App. 454–456 (certain areas that were minority communities were assigned to Anglo incumbents because of incumbent power), *id.,* at 459 ("[J]ust as 30 went looking for friendly territory regardless of color, [the incumbents] went looking for friendly territory as well regardless of color"). Since this testimony was not only irrelevant to the § 2 proceedings but arguably harmful to her claim there that racial considerations had been taken into account, these admissions are particularly telling.

To the extent that testimony of individual legislators is relevant, the following statements from the floor of the Texas House confirm that many legislators viewed these districts as political, not racial, gerrymanders:

"This plan was drawn to protect incumbents. . . .

"[I]n order to protect an incumbent Dallas congressman and an incumbent Houston congressman, county lines were not respected, urban boundaries were not respected, precinct boundaries were not respected." *Id.,* at 374–375 (statement of Rep. Ogden).

"With the adoption of this plan, you will have 8 Republican Congressmen out of 30. That's de facto regression and provides for less Republican representation in Washington, D. C.

"Communities throughout the State are surgically split in what appears to be illogical, irrational and erratic pattern[s]. But if you look at election result data throughout the State, you'll find that these lines are very logitestimony given in a legal proceeding designed to prove a conflicting conclusion,[24] this information does little more than confirm that the State believed it necessary to comply with the Voting Rights Act. Given its reasonable understanding of its legal responsibilities, see *supra,* at 1007, the legislature acted to ensure that its goal of creating a majority-black district in Dallas County was not undermined by the changes made to accommodate District 30 to other, race-neutral districting principles. As the plurality admits, see *ante,* at 958, the intent to create majority-minority districts does not in itself trigger strict scrutiny; these admissions prove nothing more than that. See also *Shaw II, ante,* at 930–932 (STEVENS, J., dissenting).

Nonracial Factors: Community

In an effort to provide a definitive explanation for the odd shape of the district, the State emphasized two factors: The

---

cal and very rational. The lines have been drawn, dissecting communities very creatively in order to pack Republicans and maximize Democratic representation." *Id.*, at 376 (statement of Rep. Gusendorf).

See also *id.*, at 377–380 (statement of Rep. Gusendorf illustrating the gerrymandering process by reference to District 6, not a majority-minority district).

These gerrymanders "d[o] not have to happen. It has nothing to do with fairness. It has nothing to do with minority representation because if we were really concerned about minority representation, we would have drawn this map in such a way that the minorities were considered and not simply to elect Democrats." *Id.*, at 384 (statement of Rep. Hill).

[24] It is ironic and slightly unfair for the plurality and District Court to use the State's §5 submission and Congresswoman Johnson's testimony in a §2 challenge to the congressional district as evidence against them in these cases. See, *e. g.,* 861 F. Supp., at 1319–1321, 1338–1339; *ante,* at 969–970. Both of those proceedings required the State to assure the Attorney General and a federal court, respectively, that the State had adequately considered the interests of minority voters in the 1991 redistricting process. Under such circumstances, it is not at all surprising that the relevant declarant would limit his or her comments to the role that race played in the redistricting process, for other considerations were largely irrelevant (the District Court's opinion to the contrary notwithstanding, see 861 F. Supp., at 1339).

presence of communities of interest tying together the populations of the district, and the role of incumbency protection. The District Court and the plurality improperly dismissed these considerations as ultimately irrelevant to the shape of the districts.

First, the appellants presented testimony that the districts were drawn to align with certain communities of interest, such as land use, family demographics, and transportation corridors. See 861 F. Supp., at 1322–1323. Although the District Court recognized that these community characteristics amounted to accurate descriptions of District 30, *id.*, at 1323, it dismissed them as irrelevant to the districting process, concluding that there was no evidence that "the Legislature had these particular 'communities of interest' in mind when drawing the boundaries of District 30." *Ibid.* The plurality concludes that appellants present no reason to displace that conclusion. *Ante*, at 966–967.

I do not understand why we should require such evidence ever to exist. It is entirely reasonable for the legislature to rely on the experience of its members when drawing particular boundaries rather than on clearly identifiable "evidence" presented by demographers and political scientists. Most of these representatives have been members of their communities for years. Unless the Court intends to interfere in state political processes even more than it has already expressed an intent to do, I presume that it does not intend to require States to create a comprehensive administrative record in support of their redistricting process. State legislators should be able to rely on their own experience, not only prepared reports. To the extent that the presence of obvious communities of interest among members of a district explicitly or implicitly guided the shape of District 30, it amounts to an entirely legitimate nonracial consideration.[25]

---

[25] As JUSTICE GINSBURG noted in her dissent in *Miller*, "ethnicity itself can tie people together" in communities of interest. 515 U. S., at 944; see also *Rogers* v. *Lodge*, 458 U. S. 613, 651 (1982) (STEVENS, J., dissenting)

Nonracial Factors: Incumbency

The plurality admits that the appellants "present a . . . substantial case for their claim that incumbency protection rivaled race in determining the district's shape." *Ante,* at 967. Every individual who participated in the redistricting process knew that incumbency protection was a critical factor in producing the bizarre lines and, as the plurality points out, *ante,* at 963–964, even the District Court recognized that this nearly exclusive focus on the creation of "safe" districts for incumbents was intimately related to the bizarre shape of district lines throughout the State.

> "[I]n Texas in 1991, many incumbent protection boundaries sabotaged traditional redistricting principles as they routinely divided counties, cities, neighborhoods, and regions. For the sake of maintaining or winning seats in the House of Representatives, Congressmen or would-be Congressmen shed hostile groups and potential opponents by fencing them out of their districts. The Legislature obligingly carved out districts of apparent supporters of incumbents, . . . and then added appendages to connect their residences to those districts. The final result seems not one in which the people select their representatives, but in which the representatives

---

("Whenever identifiable groups in our society are disadvantaged, they will share common political interests and tend to vote as a 'bloc' "). Furthermore, it may be that the very fact of racial bloc voting, a prerequisite to §2 liability, see *Thornburg* v. *Gingles,* 478 U. S. 30, 51 (1986) (and, under the Court's recent jurisprudence, to the voluntary formation of a majority-minority district), demonstrates the presence of a minority community. While communities based on race may merit a more skeptical review to ensure that a bond, rather than mere stereotyping, ties the community, see 861 F. Supp., at 1338, recognition of such a community in an electoral district certainly could, in certain circumstances, serve as a legitimate race-neutral explanation for particularly odd district shapes. By suggesting the contrary, I believe that the District Court erred. See *ibid.; post,* at 1060–1061 (SOUTER, J., dissenting).

> have selected the people." 861 F. Supp., at 1334 (citations and footnotes omitted).

See also *id.*, at 1335, n. 43. Despite this overwhelming evidence that incumbency protection was *the* critical motivating factor in the creation of the bizarre Texas districts, the District Court reached the stunning conclusion that because the process was so "different in degree" from the "generalized, and legitimate, goal of incumbent and seniority protection" that this Court has previously recognized, it could not serve as a legitimate explanation for the bizarre boundaries of the congressional districts. *Id.*, at 1334–1335. In dismissing incumbency protection once and for all, the District Court stated that "[i]ncumbent protection is a valid state interest only to the extent that it is not a pretext for unconstitutional racial gerrymandering." *Id.*, at 1336.

It is difficult to know where to begin to attack the misperceptions reflected in these conclusions,[26] and the plurality's failure to do so seriously taints its evaluation of the relative importance of nonracial considerations in the creation of District 30. The initial problem, of course, is that under the Court's threshold test as set forth in *Miller*, one must consider the role of incumbency protection *before* determining whether there is an "unconstitutional racial gerrymander." And because the ultimate focus in these gerrymandering cases is the claim that race was the "dominant and controlling rationale in drawing [the] district lines," 515 U. S., at 913, a court *must*, in applying that test, consider a State's claim that a given race-neutral rationale controlled the creation of those lines. See *id.*, at 916 ("Where [compactness, contiguity,] or *other race-neutral considerations* are the basis for redistricting legislation, and are not subordinated to race, a State can 'defeat a claim that a district has been gerrymandered on racial lines' "). Although a court may not like the State's explanation, that is no excuse for ignoring it.

---

[26] The District Court's legal analysis was probably flawed in part because its decision was issued before this Court announced its opinion in *Miller*.

If some independent bar prevented the use of that race-neutral criterion, then the District Court might be in a position to object to the State's use of it. We have, however, affirmed that a State has an interest in incumbency protection, see, *e. g., ante,* at 964–965 (opinion of O'CONNOR, J.); *White* v. *Weiser,* 412 U. S. 783, 791, 797 (1973), and also assured States that the Constitution does not require compactness, contiguity, or respect for political borders, see *Shaw I,* 509 U. S., at 647. While egregious political gerrymandering may not be particularly praiseworthy, see *infra,* at 1038–1040, it may nonetheless provide the race-neutral explanation necessary for a State to avoid strict scrutiny of the district lines where gerrymandering is the "dominant and controlling" explanation for the odd district shapes.[27]

The District Court's error had an apparently dispositive effect on its assessment of whether strict scrutiny should apply at all. Although aspects of our dispute with the plurality are "largely factual," *ante,* at 971, n., they arise not out of our disagreement with the District Court's credibility assessments, but out of that court's erroneous conclusion that the State's overwhelming reliance on this race-neutral factor was illegitimate and irrelevant to its evaluation of the factors involved in the shifting of this district's lines. A fair evaluation of the record made in light of appropriate legal standards requires a conclusion very different from the District Court's. By following the District Court down its misdirected path, the plurality itself goes astray.

---

[27] While it may be that the political gerrymandering in this case is "different in degree" from that previously recognized, 861 F. Supp., at 1334, I do not believe that the reference in *Shaw I* and *Miller* to "traditional" districting principles, see *Shaw I,* 509 U. S., at 642; *Miller,* 515 U. S., at 916, was intended to prohibit a State from changing the process or policies underlying the complex negotiating process that is modern redistricting.

Race as a Proxy

Faced with all this evidence that politics, not race, was the predominant factor shaping the district lines, the plurality ultimately makes little effort to contradict appellants' assertions that incumbency protection was far more important in the placement of District 30's lines than race. See *ante,* at 967–969. Instead, it adopts a fallback position based on an argument far removed from even the "analytically distinct" claim set forth in *Shaw I,* 509 U. S., at 652. In it, the plurality suggests that even if the predominant reason for the bizarre features of the majority-minority districts was incumbency protection, the State impermissibly used race as a proxy for determining the likely political affiliation of blocks of voters. See *ante,* at 968–971 (opinion of O'CONNOR, J.).

The effect of this process, in all likelihood, was relatively unimportant to the overall shape of the district. A comparison of the 1992 precinct results with a depiction of the proportion of black population in each census block reveals that Democratic-leaning precincts cover a far greater area than majority-black census blocks. Compare State's Exh. 9A with State's Exh. 45. One would expect the opposite effect if the single-minded goal of those drawing the districts was racial composition rather than political affiliation. At the very least, the maps suggest that the drawing of boundaries involves a demographic calculus far more complex than simple racial stereotyping.

Furthermore, to the extent that race served as a proxy at all, it did so merely as a means of "fine tuning" borders that were already in particular locations for primarily political reasons. This "fine tuning" through the use of race is, of course, little different from the kind of fine tuning that could have legitimately occurred around the edges of a compact majority-minority district.[28] I perceive no reason why a legitimate process—choosing minority voters for inclusion in a majority-minority district—should become suspect once nonracial considerations force district lines away from its core.

---

[28] The plurality expresses particular concern over the use of computer programs, particularly the availability of block-by-block racial data, and

Finally, I note that in most contexts racial classifications are invidious because they are irrational. For example, it is irrational to assume that a person is not qualified to vote or to serve as a juror simply because she has brown hair or brown skin. It is neither irrational, nor invidious, however, to assume that a black resident of a particular community is a Democrat if reliable statistical evidence discloses that 97% of the blacks in that community vote in Democratic primary elections. See Brief for United States 44. For that reason, the fact that the architects of the Texas plan sometimes appear to have used racial data as a proxy for making political judgments seems to me to be no more "unjustified," *ante,* at 969 (opinion of O'CONNOR, J.), and to have no more constitutional significance, than an assumption that wealthy suburbanites, whether black or white, are more likely to be Repub-

---

argues that the State's effort to "compil[e] detailed racial data," *ante,* at 967, is evidence of the controlling role of race in the computer-dominated process of redistricting. See *ante,* at 961–962; 861 F. Supp., at 1318–1319. It is worth noting, however, that the State made no particular "effort" to gather these data; it was included, along with similarly detailed information about sex, age, and income levels, in the data set provided by the Census Bureau and imported wholesale into the State's redistricting computers. Cf. *Shaw,* 861 F. Supp., at 457. Furthermore, even if the computer was used to fine tune the district lines to ensure that minority communities were included in District 30 (rather than individualized requests from candidates and their staffers on the basis of block-level data, see *supra,* at 1017–1018), such a technique amounts to little more than the use of a particularly efficient and accurate means of ensuring that the intended nature of the district was not undermined as incumbency protection forced it out of a compact district. I do not suggest that the end can always justify the means, but if those means are no more invidious than the end itself, I do not understand why their use should affect the analysis. I would not condemn state legislation merely because it was based on accurate information.

licans than Communists.[29] Requiring the State to ignore the association between race and party affiliation would be no more logical, and potentially as harmful, as it would be to prohibit the Public Health Service from targeting African-American communities in an effort to increase awareness regarding sickle-cell anemia.[30]

Despite all the efforts by the plurality and the District Court, then, the evidence demonstrates that race was not, in all likelihood, the "predominant" goal leading to the creation of District 30. The most reasonable interpretation of the record evidence instead demonstrates that political considerations were. In accord with the presumption against interference with a legislature's consideration of complex and competing factors, see n. 9, *supra,* I would conclude that the configuration of District 30 does not require strict scrutiny.

---

[29] "A prediction based on a racial characteristic is not necessarily more reliable than a prediction based on some other group characteristic. Nor, since a legislator's ultimate purpose in making the prediction is political in character, is it necessarily more invidious or benign than a prediction based on other group characteristics. In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders." *Mobile* v. *Bolden,* 446 U. S. 55, 88 (1980) (STEVENS, J., concurring in judgment) (footnote omitted).

To the extent that a political prediction based on race is incorrect, the voters have an entirely obvious way to ensure that such irrationality is not relied upon in the future: Vote for a different party. A legislator relying on racial demographics to ensure his or her election will learn a swift lesson if the presumptions upon which that reliance was based are incorrect.

[30] I find it particularly ironic that the Court considers the use of race *verboten* in this benign context, while the Court just recently, on the basis of evidence that, *inter alia,* "[m]ore than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black," dismissed out of hand the Ninth Circuit's assumption that "people of *all* races commit *all* types of crimes." *United States* v. *Armstrong, ante,* at 469. The Ninth Circuit's conclusion, it seems to me, is a model of the sort of race-neutral decisionmaking that this Court insists should be a part of constitutional decisionmaking processes.

V

The Houston districts present a closer question on the application of strict scrutiny. There is evidence that many of the same race-neutral factors motivating the zigzags of District 30 were present at the creation (or recreation) of Districts 29 and 18. In contrast to District 30, however, there is also evidence that the interlocking shapes of the Houston districts were specifically, and almost exclusively, the result of an effort to create, out of largely integrated communities, both a majority-black and a majority-Hispanic district. For purposes of this opinion, then, I am willing to accept, *arguendo*, the plurality's conclusion that the Houston districts should be examined with strict scrutiny.[31] Even so, the plurality errs by concluding that these districts would fail that test.

The plurality begins with the perfectly obvious assumptions that a State has a compelling interest in complying with § 2 of the Voting Rights Act and that Texas had a strong basis for believing that it would have violated that Act in 1991 if it did not create three new majority-minority districts.[32] The plurality goes on to conclude, however, that because the final shape of these districts is not coextensive with the community that would form the core of a § 2 violation, these districts would not be "narrowly tailored" to further that state interest. *Ante*, at 979. I respectfully disagree.

Neither evidence nor insinuation suggests that the State in the redistricting process considered race for any reason other than as a means of accomplishing its compelling interest of creating majority-minority districts in accord with the Voting Rights Act. The goal was, by all accounts, achieved, for these districts would certainly avoid liability under § 2 of the Voting Rights Act.[33] For reasons that continue to escape me, however, the plurality simply insists that the lack of compactness in the districts prevents them from being "narrowly tailored" solutions to the State's interests.

---

[31] Although I conclude that no reasonable interpretation of the record would require the application of strict scrutiny to District 30, I believe for the reasons that follow that it, too, would survive strict scrutiny if it were to be subject to that level of review.

[32] While I believe that the evidence supporting the State's conclusions in this regard is stronger than that suggested by the plurality or JUSTICE KENNEDY in his concurring opinion, I will simply assume, *arguendo*, as the plurality does, that the State had a reasonable fear of liability under § 2. See also *supra*, at 1007.

The plurality uses two premises to reach its conclusion that compactness is required to meet the "narrow tailoring" requirement: (i) § 2 would not have been violated unless a reasonably compact majority-minority district could have been created; and (ii) nothing in § 2 requires the creation of a noncompact district. I have no quarrel with either proposition, but each falls far short of mandating the conclusion that the plurality draws from it. While a State can be liable for a § 2 violation only if it could have drawn a compact district and failed to do so, it does not follow that creating such a district is the only way to avoid a § 2 violation. See generally *Shaw II, ante,* at 946–950 (STEVENS, J., dissenting). The plurality admits that a State retains "a limited degree of leeway" in drawing a district to alleviate fears of § 2 liability, *ante,* at 977, but if there is no independent constitutional duty to create compact districts in the first place, and the plurality suggests none, there is no reason why noncompact districts should not be a permissible method of avoiding violations of law. The fact that they might be unacceptable judicial remedies does not speak to the question whether they may be acceptable when adopted by a state legislature. Because these districts satisfy the State's compelling interest and do so in a manner that uses racial considerations only in a way reasonably designed to ensure such a satisfaction, I conclude that the districts are narrowly tailored.

---

[33] Even if the Court in *Shaw II* is correct in asserting that North Carolina's District 12 would not have allowed the State to avoid liability under § 2, see *ante,* at 916–918, no such plausible argument could be made in these cases. The core of District 30, for instance, contains more than half of all the African-American population in the district, and coincides precisely with the heart of the compact community that the State reasonably believes would give rise to a § 2 violation were it not placed in a majority-minority district. The same facts are true with respect to the Houston districts.

VI

I cannot profess to know how the Court's developing jurisprudence of racial gerrymandering will alter the political and racial landscape in this Nation—although it certainly *will* alter that landscape. As the Court's law in this area has developed, it has become ever more apparent to me that the Court's approach to these cases creates certain perverse incentives and (I presume) unanticipated effects that serve to highlight the essentially unknown territory into which it strides. Because I believe that the social and political risks created by the Court's decisions are not required by the Constitution, my first choice would be to avoid the preceding analysis altogether, and leave these considerations to the political branches of our Government.

The first unintended outcome of the legal reasoning in *Shaw II* and this case is the very result that those decisions seek to avoid: the predominance of race in the districting process, over all other principles of importance. Given the Court's unwillingness to recognize the role that race-neutral districting principles played in the creation of the bizarrely shaped districts in both this case and *Shaw II*, it now seems clear that the only way that a State can both create a majority-minority district and avoid a racial gerrymander is by drawing, "without much conscious thought," *ante*, at 967 (opinion of O'CONNOR, J.), and within the "limited degree of leeway" granted by the Court, *ante*, at 977, the precise compact district that a court would impose in a successful §2 challenge. See *post*, at 1066–1067 (SOUTER, J., dissenting). After the Court's decisions today, therefore, minority voters can make up a majority only in compact districts, whether intentionally or accidentally drawn, while white voters can be placed into districts as bizarre as the State desires.

The great irony, of course, is that by *requiring* the State to place the majority-minority district in a particular place and with a particular shape, the district may stand out as a stark, placid island in a sea of oddly shaped majority-white neighbors. See Karlan, Still Hazy After All These Years: Voting Rights in the Post-*Shaw* Era, 26 Cumberland L. Rev. 287, 309 (1995–1996). The inviolable sanctity of the §2-eligible districts will signal in a manner more blatant than the most egregious of these racial gerrymanders that "a minority community sits here: Interfere with it not." The Court-imposed barriers limiting the shape of the district will interfere more directly with the ability of minority voters to participate in the political process than did the oddly shaped districts that the Court has struck down in recent cases. Unaffected by the new racial jurisprudence, majority-white communities will be able to participate in the districting process by requesting that they be placed into certain districts, divided between districts in an effort to maximize representation, or grouped with more distant communities that might nonetheless match their interests better than communities next door. By contrast, none of this political maneuvering will be permissible for majority-minority districts, thereby segregating and balkanizing them far more effectively than the districts at issue here, in which they were manipulated in the political process as easily as white voters. This result, it seems to me, involves "discrimination" in a far more concrete manner than did the odd shapes that so offended the Court's sensibilities in *Miller*, *Shaw II*, and these cases.

In light of this Court's recent work extolling the importance of state sovereignty in our federal scheme, cf. *Seminole Tribe of Fla.* v. *Florida*, *ante*, p. 44, I would have expected the Court's sensibilities to steer a course rather more deferential to the States than the one that it charts with its decisions today. As we have previously noted, "[e]lectoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U. S., at 915; see also *post*, at 1047–1048 (SOUTER, J., dissenting). The record in these cases evidences the "complex interplay of forces that enter a legislature's redistricting calculus," 515 U. S., at 915–916, and the Court's failure to respect those forces demonstrates even less respect for the legislative process than I would have expected after the decision in *Miller*.

The results are not inconsequential. After *Miller* and today's decisions, States may find it extremely difficult to avoid litigation flowing from decennial redistricting. On one hand, States will risk violating the Voting Rights Act if they fail to create majority-minority districts. If they create those districts, however, they may open themselves to liability under *Shaw* and its progeny. See *Miller*, 515 U. S., at 949 (GINSBURG, J., dissenting). Perhaps States will simply avoid the problem by abandoning voluntary compliance with §2 of the Voting Rights Act altogether. See *Shaw I*, 509 U. S., at 672 (White, J., dissenting); *post*, at 1063–1064 (SOUTER, J., dissenting).[34] This result would not necessarily bring peace to redistricting, for there is no guarantee that districts created by court order to comply with §2 will be immune from attack under *Shaw;* in both Florida and Illinois, for instance, that very sort of schizophrenic second-guessing has already occurred. See *King* v. *State Bd. of Elections*,

---

[34] The difficulty of balancing between these competing legal requirements will only be exacerbated by the ability of litigants (and courts) to use evidence proffered in defense by the State or its actors in one context as evidence *against* the State in another. See n. 24, *supra*. While there is nothing wrong with using prior inconsistent statements (to the extent that they really are inconsistent), States will be all the more unwilling to enter into the process at all given the certainty that they will be subject to suits in which evidence offered in one as defense will be fodder for the plaintiffs in another.

No. 95–C–827, 1996 WL 130439 (ND Ill., Mar. 15, 1996); *Johnson* v. *Mortham,* 926 F. Supp. 1460 (ND Fla. 1996). Given the difficulty of reconciling these competing legal responsibilities, the political realities of redistricting, and the cost of ongoing litigation, some States may simply step out of the redistricting business altogether, citing either frustration or hopes of getting a federal court to resolve the issues definitively in a single proceeding. See, *e. g., Johnson* v. *Miller,* 922 F. Supp. 1556, 1559 (SD Ga. 1995) (after remand from *Miller,* Georgia Legislature abdicated its redistricting responsibilities to Federal District Court); *post,* at 1064 (SOUTER, J., dissenting) (noting the likely "vacuum of responsibility" at the state level).

Regardless of the route taken by the States, the Court has guaranteed that federal courts will have a hand—and perhaps the only hand—in the "abrasive task of drawing district lines." *Wells* v. *Rockefeller,* 394 U. S. 542, 553 (1969) (White, J., dissenting). Given the uniquely political nature of the redistricting process, I fear the impact this new role will have on the public's perception of the impartiality of the Federal Judiciary. I can only reiterate the Court's cautionary admonition, issued over two decades ago, that "[i]n fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'" *White* v. *Weiser,* 412 U. S., at 795 (citing *Whitcomb* v. *Chavis,* 403 U. S. 124, 160 (1971)).

I do not wish to leave the impression that decisions of the Court from *Shaw I* to the present are focusing on entirely nonexistent problems. I merely believe that the Court has entirely misapprehended the nature of the harm that flows from this sort of gerrymandering. Rather than attach blameworthiness to a decision by the majority to *share* political power with the victims of past discriminatory practices, the Court's real concern should be with the more significant harms that flow from legislative decisions that "serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community." *Karcher* v. *Daggett,* 462 U. S. 725, 748 (1983) (STEVENS, J., concurring). These cases are as good an illustration of such self-serving behavior on the part of legislators as any—but not with respect to racial gerrymandering. The real problem is the politically motivated gerrymandering that occurred in Texas. Many of the oddest twists and turns of the Texas districts would never have been created if the legislature had not been so intent on protecting party and incumbents. See also *Shaw II, ante,* at 937–938 (STEVENS, J., dissenting) (noting the same influences behind the bizarre shape of North Carolina's District 12).

By minimizing the critical role that political motives played in the creation of these districts, I fear that the Court may inadvertently encourage this more objectionable use of power in the redistricting process.[35] Legislatures and elected representatives have a responsibility to behave in a way that incorporates the "elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." *Cleburne,* 473 U. S., at 452. That responsibility is not discharged when legislatures permit and even encourage incumbents to use their positions as public servants to protect themselves and their parties rather than the interests of their constituents. See *Karcher* v. *Daggett,* 462 U. S., at 748, 754 (STEVENS, J., concurring). If any lines in Texas are worth straightening, it is those that were twisted to exclude, not those altered to include.[36]

---

[35] The contrary is also possible, of course. Perhaps the burgeoning role of federal courts in this process, along with their relative isolation from the political pressures that motivate legislatures to bend district lines, will mean that there will actually be fewer politically gerrymandered districts. Regardless of whether political gerrymanders are more or less prevalent after our decisions today, my point is the same: The Court has its hierarchy of values upside down.

VII

The history of race relations in Texas and throughout the South demonstrates overt evidence of discriminatory voting practices lasting through the 1970's. Brischetto, Richards, Davidson, & Grofman, Texas, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990, pp. 233–248 (C. Davidson & B. Grofman eds. 1994). Even in recent years, Texans have elected only two black candidates to statewide office; majority-white Texas districts have never elected a minority to either the State Senate or the United States Congress. Brief for Appellants in No. 94–806, p. 53. One recent study suggests that majority-white districts throughout the South remain suspiciously unlikely to elect black representatives. Davidson & Grofman, The Effect of Municipal Election Structure on Black Representation in Eight Southern States, in Quiet Revolution in the South, at 344. And nationwide, fewer than 15 of the hundreds of legislators that have passed through Congress since 1950 have been black legislators elected from majority-white districts.[37] In 1994, for example, 36 of the Nation's 39 black Representatives were elected from majority-minority districts, while only 3 were elected from majority-white districts.[38] See *post*, at 1050–1051 (SOUTER, J., dissenting).

---

[36] My view that a State may act unconstitutionally by gerrymandering to minimize the influence of a group on the political process is consistent with the belief that there is no constitutional error in the drawing of district lines based on benign racial considerations. As Justice Powell noted in his opinion in *Davis* v. *Bandemer,* 478 U. S., at 165, there is a sharp distinction between "gerrymandering in the 'loose' sense" (*i. e.,* the drawing of district lines to advance general political and social goals), and "gerrymandering that amounts to unconstitutional discrimination" (*i. e.,* the drawing of district lines for the sole purpose of "'occupy[ing] a position of strength at a particular time, or to disadvantage a politically weak segment of the community,'" *id.,* at 164 (citing *Karcher,* 462 U. S., at 748 (STEVENS, J., concurring)). See also 478 U. S., at 125, n. 9 ("[A] preference for nonpartisan as opposed to partisan gerrymanders . . . merely recognizes that nonpartisan gerrymanders in fact are aimed at guaranteeing rather than infringing fair group representation"). While I believe that allegations of discriminatory intent and impact, if proved, should give rise to a constitutional violation, *Shaw, Miller,* and these cases all involve allegations of both impact and intent that are far more diffuse than the allegations to which we have traditionally directed our most rigorous review. See *Shaw II, ante,* at 921–923 (STEVENS, J., dissenting); cf. *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). Limiting the constitutional ban on gerrymandering to those claims alleging that a specific group (as opposed to every group) has been harmed would be far more consistent with prior precedent than the Court's still-developing jurisprudence of racial gerrymandering.

Perhaps the state of race relations in Texas and, for that matter, the Nation, is more optimistic than might be expected in light of these facts. If so, it may be that the plurality's exercise in redistricting will be successful. Perhaps minority candidates, forced to run in majority-white districts, will be able to overcome the long history of stereotyping and discrimination that has heretofore led the vast majority of majority-white districts to reject minority candidacies. Perhaps not. I am certain only that bodies of elected federal and state officials are in a far better position than anyone on this Court to assess whether the Nation's long history of discrimination has been overcome, and that nothing in the Constitution requires this unnecessary intrusion into the ability of States to negotiate solutions to political differences while providing long-excluded groups the opportunity to participate effectively in the democratic process. I respectfully dissent.

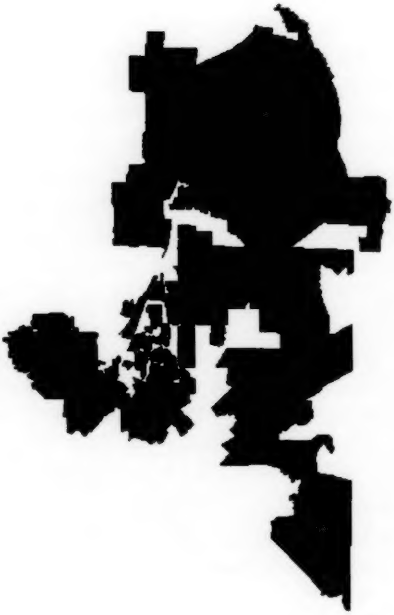
[Appendixes to opinion of STEVENS, J., follow this page.]

---

[37] Compare 51 Congressional Quarterly 10 (1993) (list of African-Americans who have served in Congress through the end of 1992) and Supplement to 52 Congressional Quarterly 10 (Nov. 12, 1994) (listing minorities in the 104th Congress) with biyearly publications of The Almanac of American Politics (published 1975-present).

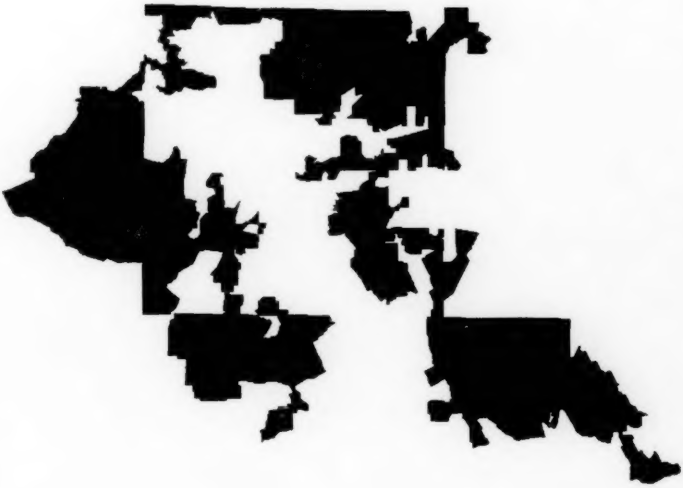
[38] D. Bositis, Joint Center for Political and Economic Studies, African-Americans & the 1994 Midterms 22 (rev. May 1995). Fifteen black candidates ran for office in majority-white districts. *Ibid.*

APPENDIX A TO OPINION OF STEVENS, J.



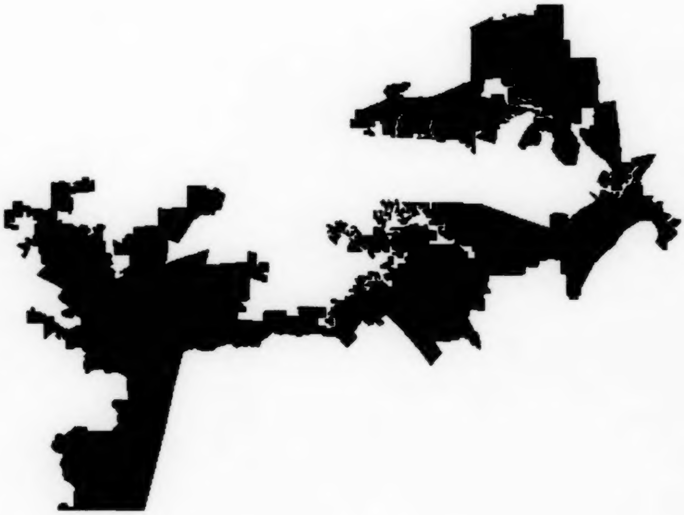
TEXAS CONGRESSIONAL DISTRICT 3

APPENDIX B TO OPINION OF STEVENS, J.

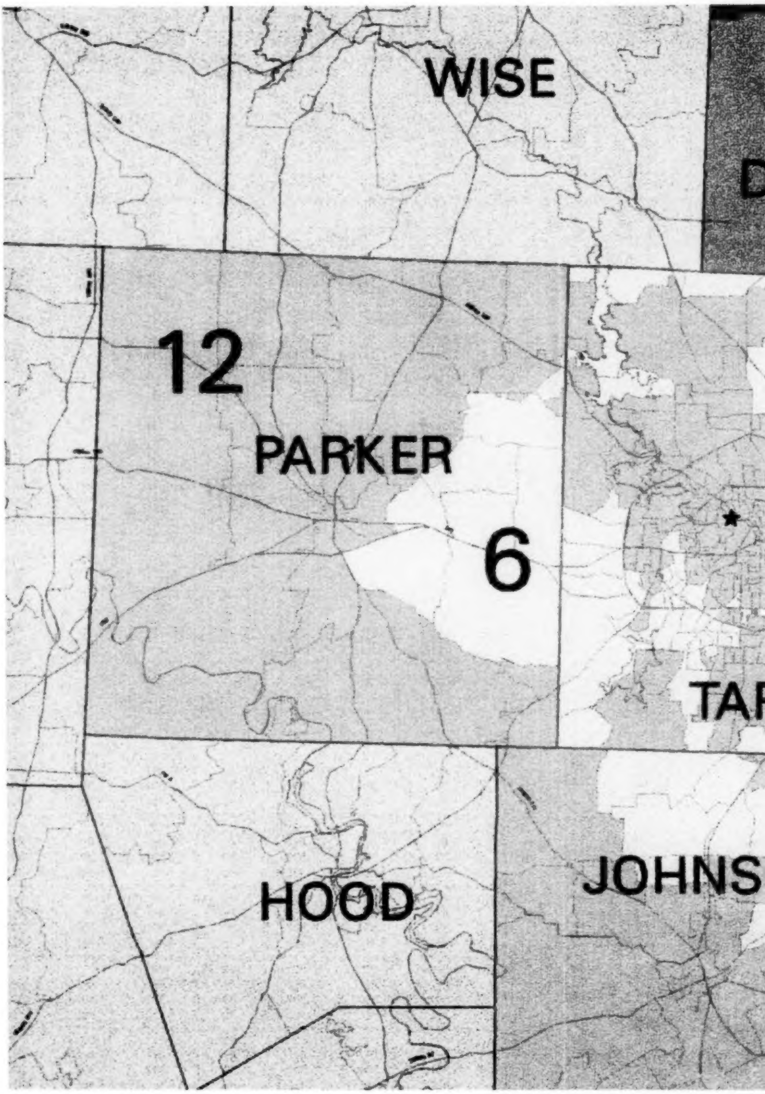


TEXAS CONGRESSIONAL DISTRICT 6

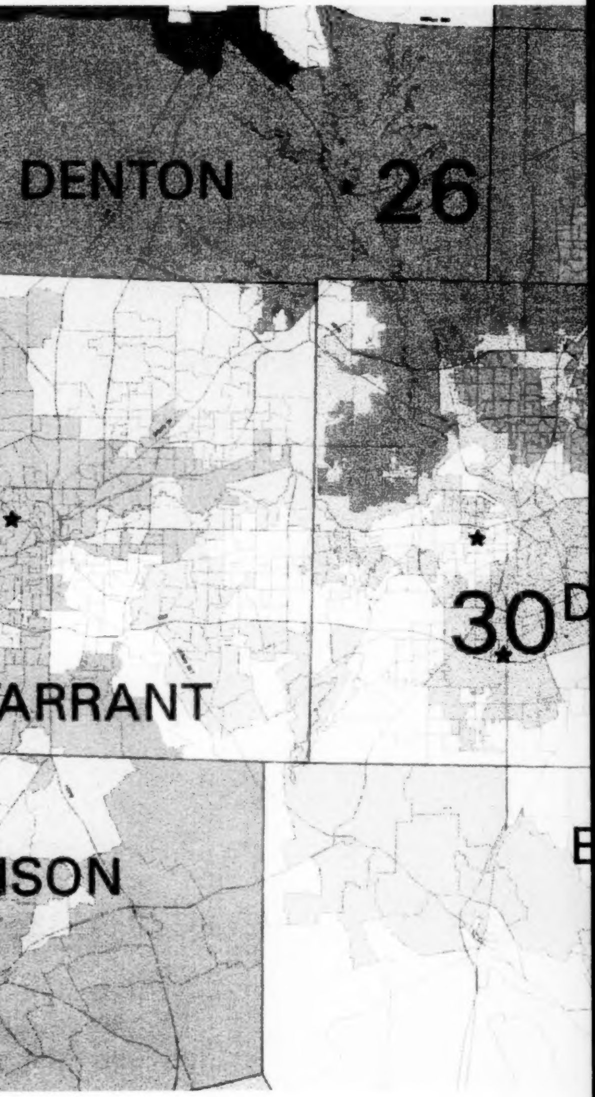
APPENDIX C TO OPINION OF STEVENS, J.



TEXAS CONGRESSIONAL DISTRICT 25

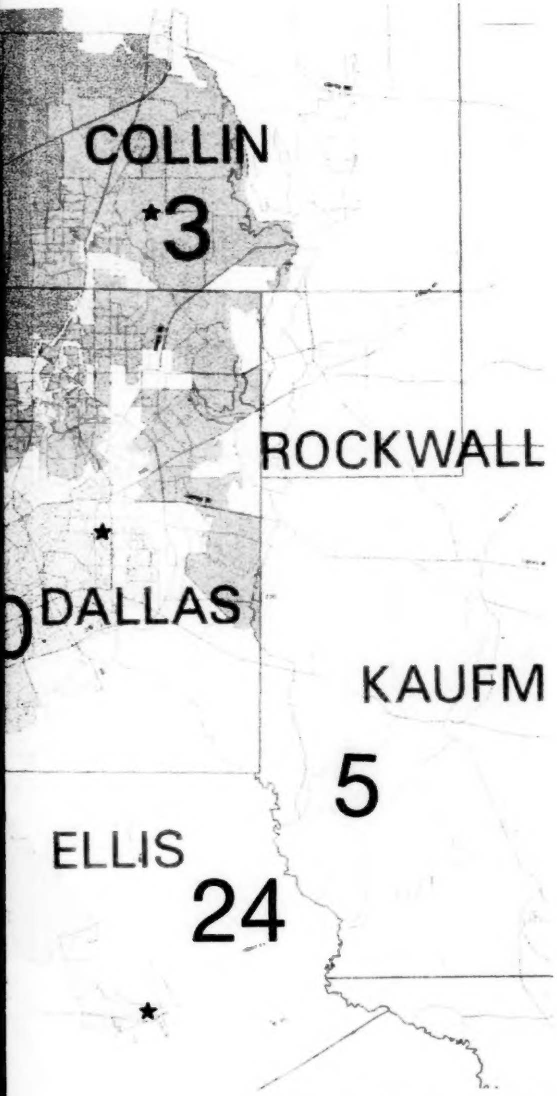

WISE
D
12
PARKER
6
TAR
HOOD
JOHNS

APPENDIX D TO OPINION

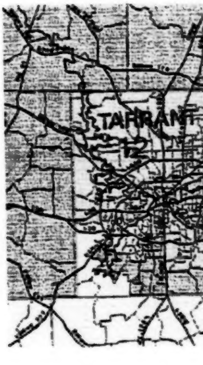

DENTON
26
ARRANT
30
D
ISON
E

DALLAS-FO CONGRESS

After 1

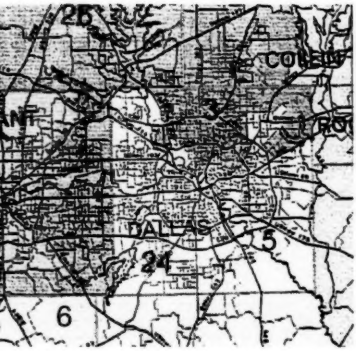

COLLIN
3
ROCKWALL
0
DALLAS
KAUFM
5
ELLIS
24

★ = Incumbent Residence



Before 1

-FORT WORTH AREA
ESSIONAL DISTRICTS
er 1991 Redistricting


26
COLLIN
3
ANT
RO
DALLAS
5
24
6

re 1991 Redistricting

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

When the Court devises a new cause of action to enforce a constitutional provision, it ought to identify an injury distinguishable from the consequences of concededly constitutional conduct, and it should describe the elements necessary and sufficient to make out such a claim. Nothing less can give notice to those whose conduct may give rise to liability or provide standards for courts charged with enforcing the Constitution. Those principles of justification, fair notice, and guidance have never been satisfied in the instance of the action announced three Terms ago in *Shaw* v. *Reno*, 509 U. S. 630 (1993) *(Shaw I)*, when a majority of this Court decided that a State violates the Fourteenth Amendment's Equal Protection Clause by excessive consideration of race in drawing the boundaries of voting districts, even when the resulting plan does not dilute the voting strength of any voters and so would not otherwise give rise to liability under the Fourteenth or Fifteenth Amendments, or under the Voting Rights Act.

Far from addressing any injury to members of a class subjected to differential treatment, the standard presupposition of an equal protection violation, *Shaw I* addressed a putative harm subject to complaint by any voter objecting to an untoward consideration of race in the political process. Although the Court has repeatedly disclaimed any intent to go as far as to outlaw all conscious consideration of race in districting, after three rounds of appellate litigation seeking to describe the elements and define the contours of the *Shaw* cause of action, a helpful statement of a *Shaw* claim still eludes this Court. This is so for reasons that go to the conceptual bone.

The result of this failure to provide a practical standard for distinguishing between the lawful and unlawful use of race has not only been inevitable confusion in statehouses and courthouses, but a consequent shift in responsibility for setting district boundaries from the state legislatures, which are invested with front-line authority by Article I of the Constitution, to the courts, and truly to this Court, which is left to superintend the drawing of every legislative district in the land.

Today's opinions do little to solve *Shaw*'s puzzles or return districting responsibility to the States. To say this is not to denigrate the importance of JUSTICE O'CONNOR's position in her separate opinion, *ante,* at 990–992, that compliance with § 2 of the Voting Rights Act is a compelling state interest; her statement takes a very significant step toward alleviating apprehension that *Shaw* is at odds with the Voting Rights Act. It is still true, however, that the combined plurality, minority, and Court opinions do not ultimately leave the law dealing with a *Shaw* claim appreciably clearer or more manageable than *Shaw I* itself did. And to the extent that some clarity follows from the knowledge that race may be considered when reasonably necessary to conform to the Voting Rights Act, today's opinions raise the specter that this ostensible progress may come with a heavy constitutional price. The price of *Shaw I,* indeed, may turn out to be the practical elimination of a State's discretion to apply traditional districting principles, widely accepted in States without racial districting issues as well as in States confronting them.

As the flaws of *Shaw I* persist, and as the burdens placed on the States and the courts by *Shaw* litigation loom larger with the approach of a new census and a new round of redistricting, the Court has to recognize that *Shaw*'s problems result from a basic misconception about the relation between race and districting principles, a mistake that no amount of case-by-case tinkering can eliminate. There is, therefore, no reason for confidence that the Court will eventually bring much order out of the confusion created by *Shaw I,* and because it has not, in any case, done so yet, I respectfully dissent.

I

As its text indicates and our cases have necessarily and repeatedly recognized,[1] Article I of the Constitution places responsibility for drawing voting districts on the States in the first instance. See Art. I, §2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"); Art. I, §4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations"). The Court has nonetheless recognized limits on state districting autonomy when it could discern a strong constitutional justification and a reasonably definite standard for doing so, as, for example, in announcing the numerical requirement of one person, one vote, see *Reynolds* v. *Sims*, 377 U. S. 533 (1964).[2] But the Court has never ignored the

---

[1] See, *e. g.*, *Growe* v. *Emison*, 507 U. S. 25, 34 (1993) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts") (citing U. S. Const., Art. I, §2); *Voinovich* v. *Quilter*, 507 U. S. 146, 156 (1993); *Reynolds* v. *Sims*, 377 U. S. 533, 586 (1964).

[2] Even in the no longer controversial instance of the one-person, one-vote rule, the adequacy of justification and standard was subject to sharp dispute, and some of the Court's best minds expressed principled hesitation to go even this far into what has been called the political thicket, see *id.*, at 615 (Harlan, J., dissenting) ("The Court's elaboration of its new 'constitutional' doctrine indicates how far—and how unwisely—it has strayed from the appropriate bounds of its authority. The consequence of today's decision is that in all but the handful of States which may already satisfy the new requirements the local District Court or, it may be, the state courts, are given blanket authority and the constitutional duty to supervise apportionment of the State Legislatures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States"); *Baker* v. *Carr*, 369

Constitution's commitment of districting responsibility to the political branches of the States and has accordingly assumed over the years that traditional districting principles widely accepted among States represented an informal baseline of acceptable districting practices. We have thus accorded substantial respect to such traditional principles (as those, for example, meant to preserve the integrity of neighborhood communities, to protect incumbents, to follow existing political boundaries, to recognize communities of interest, and to achieve compactness and contiguity); we have seen these objectives as entirely consistent with the Fourteenth and Fifteenth Amendments' demands. See, *e. g., id.*, at 578 ("A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme"); *White* v. *Weiser*, 412 U. S. 783, 797 (1973) ("[T]he District Court did not suggest or hold that the legislative policy of districting so as to preserve the constituencies of congressional incumbents was unconstitutional or even undesirable"); *Voinovich* v. *Quilter*, 507 U. S. 146, 156 (1993) ("Because the States . . . derive their reapportionment authority . . . from independent provisions of state and federal law, the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements") (internal quotation marks omitted; citation omitted).

The fundamental tenet underlying most of these constitutionally unobjectionable principles (respect for communities of interest or neighborhoods, say) is that voting is more than

---

U. S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements").

an atomistic exercise.[3] Although it is the law of the Constitution that representatives represent people, not places or things or particular interests, *Reynolds, supra,* at 562, the notion of representative democracy within the federalist framework presumes that States may group individual voters together in a way that will let them choose a representative not only acceptable to individuals but ready to represent widely shared interests within a district. Aleinikoff & Issacharoff, Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno,* 92 Mich. L. Rev. 588, 601 (1993) ("It is only as collective partisans of the same political preference—whether that preference is defined by party or race or any other measure—that voters can assert their right to meaningful participation in the political process"). Hence, in respecting the States' implementation of their own, traditional districting criteria, the Court has recognized the basically associational character of voting rights in a representative democracy.

---

[3] As Professor Issacharoff notes, our vote-dilution cases acknowledged that "the right to cast an effective ballot implied more than simply the equal weighting of all votes . . . . To be effective, a voter's ballot must stand a meaningful chance of effective aggregation with those of like-minded voters to claim a just share of electoral results. For this reason, any sophisticated right to genuinely meaningful electoral participation must be evaluated and measured as a group right . . . ." Issacharoff, Groups and the Right to Vote, 44 Emory L. J. 869, 883 (1995); see also Davidson, The Recent Revolution in Voting Rights Law Affecting Racial and Language Minorities, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990, p. 23 (C. Davidson & B. Grofman eds. 1994) ("Ethnic or racial vote dilution takes place when a majority of voters, by bloc voting for its candidates in a series of elections, systematically prevents an ethnic minority from electing most or all of its preferred candidates . . . . Vote dilution not only can deprive minority voters of the important symbolic achievement of being represented by preferred members of their own group, it can deprive them of a committed advocate in councils of government . . . [and] of the substantial benefits that government bestows . . .").

A

Accordingly, before *Shaw I,* the Court required evidence of substantial harm to an identifiable group of voters to justify any judicial displacement of these traditional districting principles. Such evidence existed in *Reynolds* v. *Sims, supra,* when the disparate weighting of votes was held unconstitutional, and it was present again when the Court recognized the unconstitutional consequences of vote dilution, see *Whitcomb* v. *Chavis,* 403 U. S. 124 (1971); *White* v. *Regester,* 412 U. S. 755 (1973). In the one case, the harm was mathematically identifiable; in the other, the arithmetic provided powerful circumstantial evidence of the impossibility of political success for the chosen candidate of a racial and numerical minority in an area with pervasive racial-bloc voting. In both cases, the complainants were from an easily identified group of voters; and even in cases of racial vote-dilution claims, which were conceptually more difficult to state than the principle of one person, one vote, there were readily recognized examples of the harm in question. Indeed, even when one acknowledged that voters would be served by a representative not of their own race and that the Constitution guaranteed no right to pick a winner, see *Whitcomb, supra,* at 153–155, it was impossible to see mere happenstance in the facts that the American voting-age population was 10.5% black, but the Congress that assembled in 1981 had only 17 black representatives out of 435 and no black senator. Statistical Abstract of the United States, 1982–83, p. 490 (103d ed. 1982) (Table 802); Black Americans: A Statistical Sourcebook 142 (L. Hornor ed. 1995) (Table 4.02); see also Parker, The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice, 45 Am. U. L. Rev. 763, 770–771 (1996) (observing that "[p]rior to the latest round of redistricting after the 1990 Census, . . . [b]lacks, who constitute 11.1% of the nation's voting age population, made up only 4.9% of the members of Congress"). The conclusion was inescapable that what we know of as intentional vote dilution accounted for this astonishing fact,[4] just as it is equally inescapable that remedies for vote dilution (and hedges against its reappearance) in the form of majority-minority districts account for the fact that the 104th Congress showed an increase of 39 black Members over the 1981 total. Minorities in Congress, 52 Cong. Q., Supplement to No. 44, p. 10 (Nov. 12, 1994); see also Parker, *supra*, at 771 (noting "a fifty percent increase in the number of black members of Congress").[5]

---

[4] See Pildes, The Politics of Race, 108 Harv. L. Rev. 1359, 1369 (1995) (reviewing Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990 (C. Davidson & B. Grofman eds. 1994)) (noting that studies of Southern States demonstrate that, as a result of racial-bloc voting, "the probability of a district's electing a Black representative was less than 1% regardless of a district's median family income, its percentage of high school graduates; its proportion of residents who were elderly, urban, foreign-born, or who had been residents of the state for more than five years; or the region of the country in which the district was located"); *id.*, at 1375 (finding similar results nationwide). There is, of course, reason to hope that conditions are improving. See *infra*, at 1076 (discussing elections in which crossover voting favors minority incumbents and in which racial issues have not played a significant role in the outcome). As I discuss in detail in Part IV, *infra*, I believe that these improvements may be attributed in large part to the effect of the Voting Rights Act, and thus to our willingness to allow race-conscious districting in certain situations.

[5] I recognize, of course, that elsewhere we have imposed prohibitions on the consideration of race, but contexts are crucial in determining how we define "equal opportunity." Consider our decisions on peremptory jury challenges. There, as in politics, one race may not have had a fair shake from the other. But the differences between jury decisionmaking and political decisionmaking are, I believe, important ones. Politics includes choices between different sets of social values, choices that may ultimately turn on the ability of a particular group to enforce its demands through the ballot box. Jury decisionmaking is defined as a neutral process, the impartial application of law to a set of objectively discovered facts. To require racial balance in jury selection would risk redefining the jury's role. Without denying the possibility that race, especially as an imperfect proxy for experience, makes a difference in jury decisionmaking (and, in some cases, legitimately so), it seems to me that the better course is to

Before *Shaw I*, we not only thus limited judicial interference with state districting efforts to cases of readily demonstrable harm to an identifiable class of voters, but we also confined our concern with districting to cases in which we were capable of providing a manageable standard for courts to apply and for legislators to follow. Within two years of holding in *Baker* v. *Carr*, 369 U. S. 186 (1962), that malapportionment was a justiciable issue, "the Court recognized that its general equal protection jurisprudence was insufficient for the task and announced an increasingly rigid, simple to apply, voting-specific mandate of equipopulousity." Karlan, Still Hazy After All These Years: Voting Rights in the Post-*Shaw* Era, 26 Cumberland L. Rev. 287, 299 (1996) (hereinafter Karlan, Post-*Shaw* Era). Likewise, although it is quite true that the common definition of a racial vote-dilution injury ("less opportunity . . . to participate in the political process and to elect representatives . . . ," 42 U. S. C. § 1973(b)) is no model of concrete description, the Court has identified categories of readily comprehensible evidence bearing on the likelihood of such an injury, including facts about size of minority population, quantifiable indications of political cohesiveness and bloc voting, historical patterns of

---

ensure a fair shake by denying each side the right to make race-based selections. The cost of the alternative is simply too great. It is an entirely different matter, however, to recognize that racial groups, like all other groups, play a real and legitimate role in political decisionmaking. It involves nothing more than an acknowledgment of the reality that our concepts of common interest, geography, and personal allegiances are in many places simply too bound up with race to deny some room for a theory of representative democracy allowing for the consideration of racially conceived interests. A majority of the Court has never disagreed in principle with this position. See, *e. g.*, *Shaw I*, 509 U. S. 630, 642 (1993) (noting that race-conscious redistricting is not always unconstitutional); *Miller* v. *Johnson*, 515 U. S. 900, 928–929 (1995) (O'CONNOR, J., concurring) (consideration of race in the redistricting process does not always violate the Constitution); *ante*, at 958 (opinion of O'CONNOR, J.) (noting that strict scrutiny does "not apply merely because redistricting is performed with consciousness of race").

success or failure of favored candidates, and so on. See, *e. g., Thornburg* v. *Gingles,* 478 U. S. 30 (1986); *White* v. *Regester,* 412 U. S., at 766–770. The particularity of this evidence goes far to separate victims of political "inequality" from those who just happened to support losing candidates.

B

Shaw I, however, broke abruptly with these standards, including the very understanding of equal protection as a practical guarantee against harm to some class singled out for disparate treatment. Whereas malapportionment measurably reduces the influence of voters in more populous districts, and vote dilution predestines members of a racial minority to perpetual frustration as political losers, what *Shaw I* spoke of as harm is not confined to any identifiable class singled out for disadvantage. See *Shaw* v. *Hunt, ante,* at 923–925, 928 *(Shaw II)* (STEVENS, J., dissenting) (noting the absence of a customary disadvantaged class and describing the *Shaw I* cause of action as a substantive due process, rather than an equal protection, claim). If, indeed, what *Shaw I* calls harm is identifiable at all in a practical sense, it would seem to play no favorites, but to fall on every citizen and every representative alike. The Court in *Shaw I* explained this conception of injury by saying that the forbidden use of race "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls," and that it leads elected officials "to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw I,* 509 U. S., at 647–648. This injury is probably best understood as an "expressive harm," that is, one that "results from the idea or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about." Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after *Shaw v. Reno,* 92 Mich. L. Rev. 483, 506–507 (1993); see also *id.*, at 493 ("The theory of voting rights [that *Shaw I*] endorses centers on the perceived legitimacy of structures of political representation, rather than on the distribution of actual political power between racial or political groups"). To the extent that racial considerations do express such notions, their shadows fall on majorities as well as minorities, whites as well as blacks, the politically dominant as well as the politically impotent. Thus, as an injury supposed to be barred by the Equal Protection Clause, this subject of the "analytically distinct" cause of action created by *Shaw I, supra,* at 652, bears virtually no resemblance to the only types of claims for gerrymandering we had deemed actionable following *Davis* v. *Bandemer,* 478 U. S. 109 (1986), those involving districting decisions that removed an identifiable class of disfavored voters from effective political participation. See, *e. g., Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960); *Thornburg* v. *Gingles, supra.*[6]

Just as the logic of traditional equal protection analysis is at odds with *Shaw*'s concept of injury, so the Court's rhetoric of racially motivated injury is inapposite to describe the consideration of race that it thinks unreasonable. Although the Court used the metaphor of "political apartheid" as if to refer to the segregation of a minority group to eliminate its association with a majority that opposed integration, *Shaw I, supra,* at 647, talk of this sort of racial separation is not on point here. The *de jure* segregation that the term "political apartheid" brings to mind is unconstitutional because it emphatically implies the inferiority of one race. See *Brown* v. *Board of Education*, 347 U. S. 483, 494 (1954) ("To separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community"). *Shaw I*, in contrast, vindicated the complaint of a white voter who objected not to segregation but to the particular racial proportions of the district. See Karlan, Our Separatism? Voting Rights as an American Nationalities Policy, 1995 U. Chi. Legal Forum 83, 94 (hereinafter Karlan, Our Separatism) (noting the irony of using the term "apartheid" to describe what are "among the most integrated districts in the country"). Whatever this district may have symbolized, it was not "apartheid." Nor did the proportion of its racial mixture reflect any purpose of racial subjugation, the district in question having been created in an effort to give a racial minority the same opportunity to achieve a measure of political power that voters in general, and white voters and members of ethnic minorities in particular, have enjoyed as a matter of course. In light of a majority-minority district's purpose to allow previously submerged members of racial minorities into the active political process, this use of race cannot plausibly be said to affect any individual or group in any sense comparable to the injury inflicted by *de jure* segregation. It obviously conveys no message about the inferiority or outsider status of members of the white majority excluded from a district. And because the condition addressed by creating such a district is a function of numbers, the plan implies nothing about the capacity or value of the minority to which it gives the chance of electoral success.

---

[6] Leaving aside the question whether such a catholic injury can be a violation of the Equal Protection Clause, there still might be a use of race that harms all district voters because it is used to an unreasonable degree. But see *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U. S. 464, 489 (1982). But the Court has never succeeded in identifying how much is too much, having adopted a "predominant purpose" test that amounts to a practical repudiation of any hope of devising a workable standard. See Part I–C, *infra.*

Added to the anomalies of *Shaw I*'s idea of equal protection injury and the rhetoric of its descriptions, there is a further conceptual inadequacy in *Shaw I*. Whereas it defines injury as the reinforcement of the notion that members of a racial group will prefer the same candidates at the polls, the immediate object of the constitutional prohibition against the intentional dilution of minority voting strength is to protect the right of minority voters to make just such a preference effective. There would, for example, be no vote dilution by virtue of racial-bloc voting unless voters of a racial minority would themselves tend to stick together in voting for a given candidate (perhaps, though not necessarily, of their own race, as well). Indeed, if there were no correlation between race and candidate preference, it would make no sense to say that minority voters had less opportunity than others to elect whom they would; they would be part of the mainstream and the winners would be their own choices. When voting is thus racially polarized, it is just because of this polarization that majority-minority districts provide the only practical means of avoiding dilution or remedying the dilution injury that has occurred already. *Shaw I* has thus placed those who choose to avoid the long-recognized constitutional harm of vote dilution at risk by casting doubt on the legitimacy of its classic remedy; the creation of a majority-minority district "reinforces" the notion that there is a correlation between race and voting, for that correlation is the very condition on which the success of the court-ordered remedy depends. So it is that the Court's definition of injury is so broad as to cover constitutionally necessary efforts to prevent or remedy a violation of the Fourteenth and Fifteenth Amendments and of § 2 of the Voting Rights Act.

One way to temper the overreach of the Court's concept of injury (though it would not avoid the difficulty that there is no equal protection injury in the usual sense, discussed above, see *supra*, at 1050) would be simply to exclude by definition from *Shaw I* injury a use of race in districting that is reasonably necessary to remedy or avoid dilution; the Court's move at least in this direction, see *infra*, at 1066–1069, is a sound one, as is its continuing recognition (despite its broad definition of harm) that not every intentional creation of a majority-minority district requires strict scrutiny.

See *ante,* at 958; *ante,* at 993 (O'CONNOR, J., concurring); cf. *Miller,* 515 U. S., at 928 (O'CONNOR, J., concurring). But the suggested qualification would fall short of eliminating the difficulty caused by the existing definition, for the uses of race to remedy past dilution or to hedge against future dilution are not the only legitimate uses of race that are covered, and threatened, by the overbreadth of the *Shaw* injury. This will become clear in examining the Court's efforts to solve its definitional problems by relying upon the degree to which race is used in defining the injury it discerns.

C

The Court's failure to devise a concept of *Shaw* harm that distinguishes those who are injured from those who are not, or to differentiate violation from remedy, is matched by its inability to provide any manageable standard to distinguish forbidden districting conduct from the application of traditional state districting principles and the plans that they produce. This failure, while regrettable, need not have occurred, for when the Court spoke in *Shaw I* of a district shape so "bizarre" as to be an unequivocal indication that race had influenced the districting decision to an unreasonable degree, *Shaw I* could have been pointing to some workable criterion of shape translatable into objective standards. Leaving *Shaw*'s theoretical inadequacies aside, it would have been possible to devise a cause of action that rested on the expressive character of a district's shape, and created a safe harbor in the notion of a compact district objectively quantified in terms of dispersion, perimeter, and population. See Pildes & Niemi, 92 Mich. L. Rev., at 553–575. Had the Court followed this course, the districts whose grotesque shapes provoke the sharpest reaction would have been eliminated in racially mixed States, which would have known how to avoid *Shaw* violations and, thus, federal judicial intrusion. *Shaw* would have been left a doctrinal incongruity, but not an unmanageable one.

The Court, however, rejected this opportunity last Term in *Miller* v. *Johnson, supra,* when it declined to contain *Shaw* by any standard sufficiently quantifiable to guide the decisions of state legislators or to inform and limit review of districting decisions by the courts. The Court rejected shape as a sufficient condition for finding a *Shaw* violation, or even a necessary one. 515 U. S., at 915. See also Issacharoff, The Constitutional Contours of Race and Politics, 1995 S. Ct. Rev. 45, 56 (hereinafter Issacharoff, Constitutional Contours) ("*Miller* is rather categorical in its refusal to limit the application of the equal protection clause to bizarre districts alone"). Instead, it recharacterized the cause of action in terms devised in other cases addressing essentially different problems, by proscribing the consideration of race when it is the "predominant factor motivating the legislatur[e]," 515 U. S., at 916, or when the use of race is "in substantial disregard of customary and traditional districting practices," *id.*, at 928 (O'CONNOR, J., concurring).

As a standard addressed to the untidy world of politics, neither "predominant factor" nor "substantial disregard" inspires much hope.[7] It is true of course that the law rests certain other liability decisions on the feasibility of untangling mixed motives, and courts and juries manage to do the untangling. See, *e. g., Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U. S. 274, 287 (1977) (employee's burden to show that constitutionally protected conduct is a "substantial factor" in decision not to rehire him; employer's burden to show that it would have made same decision "even in the absence of the protected conduct"); *Hunter* v. *Underwood*, 471 U. S. 222, 228 (1985) ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind the enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor"); but see *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265 (1977) ("Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one"). At first glance, then, it may not seem entirely out of the question for courts to sort out the strands in *Shaw* cases. But even this cool comfort would be misplaced.

---

[7] See *Cannon* v. *North Carolina State Bd. of Ed.*, 917 F. Supp. 387, 391 (EDNC 1996) (describing this "difficult area of the law" and predicting that it will "gain better definition by reason of an imminent decision by the Supreme Court of the United States [in *Shaw II*]"); Briffault, Race and Representation After *Miller v. Johnson,* 1995 U. Chi. Legal Forum 23, 50 (1995) ("[I]t is unclear what work the adjectives 'predominant' and 'overriding' do in the Supreme Court's test"); Karlan, Post-*Shaw* Era 287 (*Miller* "further unsettled the already unclear roadmap" of *Shaw I*); Issacharoff, Constitutional Contours 60 ("[T]he Court's facile reliance on standards of causation vaguely reminiscent of tort law does nothing to defer confronting the hard issue of acceptable standards of conduct").

While a court may be entitled to some confidence that in most cases it will be able, for example, to distinguish the relative strength of an employer's dissatisfaction with an employee's job performance from his displeasure over a worker's union membership, see *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393, 403–405 (1983), such confidence would be unwarranted in the districting context. It is not merely that the very nature of districting decisions makes it difficult to identify whether any particular consideration, racial or otherwise, was the "predominant motive," though that is certainly true:

> "Districting plans are integrated bundles of compromises, deals and principles. To ask about the reason behind the design of any one particular district is typically to implicate the entire pattern of purposes and trade-offs behind a districting plan as a whole. Searching for 'the reason' or 'the dominant reason' behind a particular district's shape is often like asking why one year's federal budget is at one level rather than another. Moreover, to require a coherent explanation for the spe-

> cific shape of even one district is to impose a model of legalistic decisionmaking on the one political process that least resembles that model." Pildes & Niemi, *supra*, at 585–586 (footnote omitted).

The reason that use of the predominant motive standard in reviewing a districting decision is bound to fail is more fundamental than that: in the political environment in which race can affect election results, many of these traditional districting principles cannot be applied without taking race into account and are thus, as a practical matter, inseparable from the supposedly illegitimate racial considerations. See Pildes & Niemi, *supra*, at 578 ("[R]ace frequently correlates with other socioeconomic factors. In evaluating oddly shaped districts, this correlation will require courts to attempt to untangle legitimate communities of interest from the now-illegitimate one of race. If blacks as blacks cannot be grouped into a 'highly irregular' district, but urban residents or the poor can, how will courts distinguish these contexts, and under what mixed-motive standard?"); Issacharoff, Constitutional Contours 58 ("Given the palpability of racial concerns in the political arena, [*Miller*'s causation standard could] either doom all attempts to distribute political power in multi-ethnic communities or . . . fail to provide a basis for distinguishing proper from improper considerations in redistricting").

If, for example, a legislature may draw district lines to preserve the integrity of a given community, leaving it intact so that all of its members are served by one representative, this objective is inseparable from preserving the community's racial identity when the community is characterized, or even self-defined, by the race of the majority of those who live there. This is an old truth, having been recognized every time the political process produced an Irish or Italian or Polish ward.

> "[E]thnicity itself can tie people together, as volumes of social science literature have documented—even people with divergent economic interests. For this reason, ethnicity is a significant force in political life. . . .
>
> * * * * *
>
> ". . . The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation." *Miller* v. *Johnson*, 515 U. S., at 944–945 (GINSBURG, J., dissenting).

Or take the traditional principle of providing protection for incumbents. The plurality seems to assume that incumbents may always be protected by drawing lines on the basis of data about political parties. Cf. *ante*, at 967–968, 970–971. But what if the incumbent has drawn support largely for racial reasons? What, indeed, if the incumbent was elected in a majority-minority district created to remedy vote dilution that resulted from racial-bloc voting? It would be sheer fantasy to assume that consideration of race in these circumstances is somehow separable from application of the traditional principle of incumbency protection, and sheer incoherence to think that the consideration of race that is constitutionally required to remedy Fourteenth and Fifteenth Amendment vote dilution somehow becomes unconstitutional when aimed at protecting the incumbent the next time the census requires redistricting.

Thus, it is as impossible in theory as in practice to untangle racial consideration from the application of traditional districting principles in a society plagued by racial-bloc voting[8] with a racial minority population of political significance, or at least the unrealized potential for achieving it. And it is for just this fundamental reason that a test turning on predominant purpose is incapable of producing any answer when traditional districting principles are applied in the political environment in which *Shaw I* actions are brought.

---

[8] Even in areas where there is no racial-bloc voting, the application of certain traditional districting principles may involve a legitimate consideration of race.

II

Shaw I's recognition of a misuse of race in districting even when no vote dilution results thus rests upon two basic deficiencies: first, the failure to provide a coherent concept of equal protection injury, there being no separably injured class and no concept of harm that would not condemn a constitutionally required remedy for past dilution as well as many of the districting practices that the Court is seeking to preserve; second, the failure to provide a coherent test for distinguishing a "predominant" racial consideration from the application of traditional districting principles in a society whose racial mixture is politically significant and where racial-bloc voting exists. The necessary consequence of these shortcomings is arbitrariness; it is impossible to distinguish what is valid from what is not, or to decide how far members of racial minorities may engage "in the same sort of pluralist electoral politics that every other bloc of voters enjoys." Karlan, Our Separatism 103. Indeed, if one needed further proof of this arbitrariness, one need go no further than JUSTICE STEVENS's dissent in this case. The plurality effectively concedes that JUSTICE STEVENS has not unfairly applied the principles governing the *Shaw* cause of action, cf. *ante*, at 971, n. (noting that "[i]n the application of our precedents to District 30, our disagreement with JUSTICE STEVENS' dissent, *[ante]*, at 1014–1031, is largely factual"); in my judgment he has faithfully applied those principles in the spirit intended by the plurality. And yet the conclusions that the two sides reach after applying precisely the same test could not be more different.

Along with this endemic unpredictability has come the destruction of any clear incentive for the States with substantial minority populations to take action to avoid vote dilution. Before *Shaw*, state politicians who recognized that minority vote dilution had occurred, or was likely to occur without redistricting aimed at preventing it, could not only urge their colleagues to do the right thing under the Fourteenth Amendment, but counsel them *in terrorem* that losing a dilution case would bring liability for counsel fees under 42 U. S. C. § 1988(b) or 42 U. S. C. § 1973*l*(e). See Issacharoff, Constitutional Contours 48 ("Minority political actors could leverage not only their political power but the enforcement provisions of Section 5 of the Voting Rights Act, and the threat of suit under Section 2 of the Act against adverse districting decisions"); cf. *Hastert* v. *Illinois State Bd. of Election Commr's*, 28 F. 3d 1430, 1444 (CA7 1993) (awarding fees to the prevailing parties in a case in which the state legislature failed to draw congressional districts, over the Board of Elections's objection that it had "no interest in the eventual outcome except that there *be* an outcome" for it to implement) (emphasis in original). But this argument is blunted now, perhaps eliminated in practice, by the risk of counsel fees in a *Shaw I* action. States seeking to comply in good faith with the requirements of federal civil rights laws "now find themselves walking a tightrope: if they draw majority-black districts they face lawsuits under the equal protection clause; if they do not, they face both objections under section 5 of the Voting Rights Act and lawsuits under section 2." Karlan, Post-*Shaw* Era 289. See *ante*, at 1037 (STEVENS, J., dissenting) ("On one hand, States will risk violating the Voting Rights Act if they fail to create majority-minority districts. If they create those districts, however, they may open themselves to liability under *Shaw* and its progeny"). The States, in short, have been told to get things just right, no dilution and no predominant consideration of race short of dilution, without being told how to do it. The tendency of these conflicting incentives is toward a stalemate, and neither the moral force of the Constitution nor the mercenary threat of liability can operate effectively in this obscurity.

As a consequence, where once comprehensible districting obligations confronted the legislators and governors of the States, there is now a vacuum of responsibility in any State with the mixed population from which *Shaw* suits come. We can no longer say with the old assurance that such States have a duty to comply with federal requirements in districting, since a State, like an individual, can hardly be blamed for failing to fulfill an obligation that has never been explained. It is true, of course, that a State may suffer consequences if the ultimate arbiter decides on a result different from the one the State has put in place, but that bad luck does not change the fact that a State cannot be said to be obliged to apply a standard that has not been revealed. Because the responsibility for the result can only be said to rest with the final arbiter, the practical responsibility over districting has simply shifted from the political branches of the States with mixed populations to the courts, and to this Court in particular. "The Court has apparently set itself upon a course of . . . reviewing challenged districts one by one and issuing opinions that depend so idiosyncratically on the unique facts of each case that they provide no real guidance to either lower courts or legislatures." Karlan, Post-*Shaw* Era 288. The tragedy in this shift of political responsibility lies not only in the fact of its occurrence in this instance, but in the absence of coherent or persuasive justifications for causing it to occur.

III

Although today's cases do not address the uncertainties that stem from *Shaw*'s underlying incoherence, they do aim to mitigate its inscrutability with some specific rules.

A

In each of today's cases, the Court expressly assumes that avoiding a violation of the Voting Rights Act qualifies as a sufficiently compelling government interest to satisfy the requirements of strict scrutiny. See *ante*, at 977 ("As we have done in each of our three previous cases . . . , we assume without deciding that compliance with the results test [of § 2 of the Voting Rights Act] . . . can be a compelling state interest"); *Shaw II, ante*, at 915 ("We assume, *arguendo*, for the purpose of resolving this case, that compliance with § 2 could be a compelling interest"). While the Court's decision to assume this important point, *arguendo*, is no holding, see *Seminole Tribe of Fla.* v. *Florida, ante*, at 125 (SOUTER, J., dissenting), the assumption itself is encouraging because it confirms the view that the intentional creation of majority-minority districts is not necessarily a violation of *Shaw I, ante*, at 958 (strict scrutiny does not "apply to all cases of intentional creation of majority-minority districts"), and it indicates that the Court does not intend to bring the *Shaw* cause of action to what would be the cruelly ironic point of finding in the Voting Rights Act of 1965 (as amended) a violation of the Fourteenth Amendment's equal protection guarantee. Cf. Pildes & Niemi, 92 Mich. L. Rev., at 498 (observing that "[i]f the Court believed there were serious constitutional questions with the fundamental structure of this scheme, the Court had numerous means to avoid permitting an unconstitutionally composed legislature to assume power," and seeing the reservation of this question in *Voinovich* v. *Quilter*, 507 U. S., at 157, as "evidence that a majority of the Court is not prepared to find a general ban on race-conscious districting in the Constitution"). JUSTICE O'CONNOR's separate opinion, *ante*, at 990–992, bears on each of these points all the more emphatically, for her view that compliance with § 2 is (not just *arguendo*) a compelling state interest and her statement of that position virtually insulate the Voting Rights Act from jeopardy under *Shaw* as such.

B

The second point of reference to come out of today's cases is the rule that if a State begins its map-drawing efforts with a compact majority-minority district required by *Gingles,* the State may not rely too heavily on racial data in adjusting that district to serve traditional districting principles. While this rule may indeed provide useful guidance to state legislatures, its inherent weakness is clear from what was said above, *supra,* at 1060–1062: it is in theory and in fact impossible to apply "traditional districting principles" in areas with substantial minority populations without considering race. As to some of those principles, to be sure, the ban on the overuse of racial data may not have much significance; racially identified communities can be identified in other ways and will be, after today. But protecting a minority incumbent may be another matter, since we cannot assume, as the plurality does, that reliance on information about "party affiliation" will serve to protect a minority incumbent, and we cannot tell when use of racial data will go too far on the plurality's view, *ante,* at 962–963. It therefore may well be that loss of the capacity to protect minority incumbency is the price of the rule limiting States' use of racial data. If so, it will be an exceedingly odd result, when the whole point of creating yesterday's majority-minority district was to remedy prior dilution, thus permitting the election of the minority incumbent who (the Court now seems to declare) cannot be protected as any other incumbent could be.

C

The third point of reference attributable to today's cases is as yet only a possibility; a suggestion in the discussions of the narrow tailoring test that States seeking to avoid violating §2 of the Voting Rights Act may draw the district that the Voting Rights Act compels, and this district alone. See *Shaw II, ante,* at 915–918 (rejecting North Carolina's District 12 because it does not sufficiently coincide with the assumed *Gingles* district); *ante,* at 1035 (STEVENS, J., dissenting) ("[I]t now seems clear that the only way that a State can both create a majority-minority district and avoid a racial gerrymander is by drawing . . . within the 'limited degree of leeway' granted by the Court . . . the precise compact district that a court would impose in a successful §2 challenge"). If the Court were to say that a district drawn to avoid dilution must respond to the dilution threat in some geographically exact way, but see *Shaw II, ante,* at 916, n. 8 (suggesting that States may have flexibility in complying with §2 of the Voting Rights Act); *ante,* at 1037 (STEVENS, J., dissenting) (noting that States traditionally have enjoyed a broader discretion in drawing district lines), then presumably a district drawn in a race-conscious fashion could survive only if it was as compact as the *Gingles* district hypothesized for purposes of stating a vote-dilution claim, and positioned where the hypothetical district would be.

If the Court ultimately were to reach such a conclusion, it would in one respect be taking a step back toward *Shaw I* and its suggestion that a district's shape might play an important, if not determinative role in establishing a cause of action. Such a step would, however, do much more than return to *Shaw I,* which suggested that a compact district would be a safe haven, but not that the district hypothesized under *Gingles* was the only haven. See, *e. g., Shaw I,* 509 U. S., at 646 ("The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions").

I refer to this step as a "possibility" deliberately. The Court in *Shaw II* does not go beyond an intimation to this effect, and *Bush* raises doubt that the Court would go so far. See *ante,* at 977–978 (rejecting the argument made by JUSTICE STEVENS); see also *ante,* at 978 ("[T]he States retain a flexibility that federal courts enforcing §2 lack . . . . And nothing that we say today should be read as limiting 'a State's discretion to apply traditional districting principles' "); but see *ante,* at 994 (O'CONNOR, J., concurring) ("[I]f a State pursues that compelling interest by creating a district that 'substantially addresses' the potential liability, and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons, its districting plan will be deemed narrowly tailored" (citations omitted)); but see also *ante,* at 977 ("We also reaffirm that the 'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests. . . . We thus reject, as impossibly stringent, the District Court's view of the narrow tailoring requirement, that 'a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria' " (citation omitted)). Indeed, *Bush* leaves open the possibility that a State could create a majority-minority district that does not coincide with the *Gingles* shape so long as racial data are not overused, *ante,* at 962, 981, and it does not suggest that a *Shaw* claim could be premised solely on a deviation from a *Gingles* district.

Suffice it to say for now that if the Court were to try to render *Shaw* more definite by imposing any such limitations on shape and placement, the added measure of clarity would either be elusive or it would come at an exorbitant price from States seeking to comply with the Voting Rights Act and the Fourteenth and Fifteenth Amendments. It would be elusive if the Court meant that race could be considered in alleviating racial dilution but not in applying any traditional districting principle: we have already seen that race is inextricably intertwined with some common districting principles when applied in a multiracial society. See *supra,* at 1060–1062. Or it would come at an exorbitant price, because no other districting principle would be allowed to affect the compactness or placement that would be required for purposes of *Gingles.* The Court would thus be cutting back on a State's power to vary district shape through its application of the very districting principles that are supposed to predominate in importance over racial consideration. That is, the Court would be reducing the discretion of a State seeking to avoid or correct dilution to the scope of a federal court's discretion when devising a remedy for dilution. There could, of course, be no justification for taking any such step. While there is good reason to limit a federal court's discretion to interfere in a State's political process when it employs its remedial power in dilution cases, cf. *Voinovich* v. *Quilter*, 507 U. S., at 156 ("Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States . . . to conduct apportionment"), there is no apparent reason to impose the same limitations upon the discretion accorded to a State subject to an independent constitutional duty to make apportionment decisions, see *ibid.* ("Because the States . . . derive their reapportionment authority . . . from independent provisions of state and federal law, . . . the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements") (internal quotation marks omitted). The principles of federalism that we have tried to follow strongly counsel against imposing any such limitations.

D

In sum, the three steps the Court takes today toward a more definite cause of action either fail to answer the objections to *Shaw I* or prompt objections of their own. Recognition of a State's interest in complying with the Voting Rights Act does not address the practical impossibility courts will encounter in identifying a predominant use of race, as distinguished from some lesser, reasonable consideration of it, when a State applies its customary districting principles. The limitation on the use of racial data is unlikely to make much difference in practice except to jeopardize minority incumbency protection. And the possibility that the Court will require *Gingles* districts (or districts substantially close to them) when compliance with § 2 of the Voting Rights Act is an object of districting would render a State's districting obligation more definite only by eliminating its ability to apply the very districting principles traditionally considered to be important enough to furnish a theoretical baseline of reasonable districting practices.

IV

If today's developments fall short of curing *Shaw*'s unworkability, it must be said that options for addressing them are few. Assuming that *Shaw* is not to be overruled as a flawed experiment, the Court may select from two alternatives, depending on whether its weightier concern is to preserve traditional districting principles or to cure the anomalies created by *Miller*'s "predominant purpose" criterion.

If the Court's first choice is to preserve *Shaw* in some guise with the least revolutionary effect on districting principles and practice, the Court could give primacy to the principle of compactness and define the limits of tolerance for unorthodox district shape by imposing a measurable limitation on the bizarre, presumably chosen by reference to historical practice (adjusted to eliminate the influence of any dilution that very practice may have caused in the past, cf. Pildes & Niemi, 92 Mich. L. Rev., at 573–574, n. 246 (discussing the egregious racial gerrymanders of the 19th century)) and calculated on the basis of a district's dispersion, perimeter, and population. See *id.*, at 553–575. This alternative would be true to *Shaw I* in maintaining that a point can be reached when the initially lawful consideration of race becomes unreasonable and in identifying appearance as the expression of undue consideration; and it would eliminate *Miller*'s impossible obligation to untangle racial considerations from so-called "race-neutral" objectives (such as according respect to community integrity and protecting the seats of incumbents) when the racial composition of a district and voter behavior bar any practical chance of separating them. The incongruities of *Shaw*'s concept of injury when considered in light of our customary equal protection analysis, our remedial practice, and traditional respect for state districting discretion would, of course, persist, but if *Shaw* were defined by measures that identified forbidden shape as the manifestation of unreasonable racial emphasis, we would at least provide the notice and guidance that are missing from the law today.

The other alternative for retaining a *Shaw* cause of action in some guise would be to accept the fact that, in the kind of polarized multiracial societies that will generate *Shaw* actions as presently understood, racial considerations are inseparable from many traditional districting objectives, making it impossible to speak of race as predominating. The consequence of facing this reality is that if some consideration of race is to be forbidden as supposedly unreasonable in degree, then the use of districting principles that implicate the use of race must be forbidden. That is, traditional districting practices must be eliminated. Such a result would, of course, be consistent with *Shaw I*'s concept of injury as affecting voters of whatever race. But cf. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 489 (1982) (fact that some expressive harms are insufficient to satisfy Article III standing requirements does not allow for relaxation of those requirements). The result, in short, would be colorblindness in determining the manner of choosing representatives, either by eliminating the practice of districting entirely, or by replacing it with districting on some principle of randomness that would not account for race in any way.

While such is the direction in which *Shaw* and *Miller* together point, the objections to following any such course seem insurmountable. The first is the irony that the price of imposing a principle of colorblindness in the name of the Fourteenth Amendment would be submerging the votes of those whom the Fourteenth and Fifteenth Amendments were adopted to protect, precisely the problem that necessitated our recognition of vote dilution as a constitutional violation in the first place. Eliminating districting in the name of colorblindness would produce total submersion; random submersion (or packing) would result from districting by some computerized process of colorblind randomness. Thus, unless the attitudes that produce racial-bloc voting were eliminated along with traditional districting principles, dilution would once again become the norm. While dilution as an intentional constitutional violation would be eliminated by a randomly districted system, this theoretical nicety would be overshadowed by the concrete reality that the result of such a decision would almost inevitably be a so-called "representative" Congress with something like 17 black members. See *supra,* at 1050. In any event, the submergence would violate the prohibition of even nonintentional dilution found in §2 of the Voting Rights Act. The only way to avoid this conflict would be to declare the Voting Rights Act unconstitutional, a prospect hardly in harmony with the Court's readiness to assume today that compliance with the Voting Rights Act qualifies as a compelling state interest for purposes of litigating a *Shaw* claim.

The second objection is equally clear. Whatever may be the implications of what I have called *Shaw*'s failings, the Court has repeatedly made it plain that *Shaw* was in no way intended to effect a revolution by eliminating traditional districting practice for the sake of colorblindness. *Shaw I,* 509 U. S., at 642 ("Despite their invocation of the ideal of a 'color-blind' Constitution, see *Plessy* v. *Ferguson,* 163 U. S. 537, 559 (1896) (Harlan, J., dissenting), appellants appear to concede that race-conscious districting is not always unconstitutional. . . . That concession is wise: This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances"); cf. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 520–521 (1989) (SCALIA, J., concurring in judgment) (criticizing the majority for rejecting a strict principle of colorblindness). Indeed, the very fear that led to the creation of the *Shaw* cause of action was that racial concerns were taking too heavy a toll on districting practices that had evolved over the years through the political process. *Shaw I,* 509 U. S., at 644–649. JUSTICE O'CONNOR, moreover, has made it obvious that race has a legitimate place in districting, *id.*, at 642 ("[R]ace-conscious redistricting is not always unconstitutional"); *Miller,* 515 U. S., at 928–929 (O'CONNOR, J., concurring); *ante,* at 993 (O'CONNOR, J., concurring), that the intentional creation of majority-minority districts is not forbidden by *Shaw, Miller, supra,* at 928 (O'CONNOR, J., concurring) (districts may be permissible "even though race may well have been considered in the redistricting process"); *ante,* at 990–992 (O'CONNOR, J., concurring), and that *Shaw* was aimed at only the exceptional district, 515 U. S., at 928–929 ("Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts"). Of the present Court majority, only JUSTICES SCALIA and THOMAS are on record as concluding that any intentional creation of a majority-minority district is a forbidden racial gerrymander. *Ante,* at 1001 (THOMAS, J., concurring in judgment).

Since a radical transformation of the political selection process in the name of colorblindness is out of the question, the Court's options for dealing with *Shaw*'s unworkability are in truth only these: to confine the cause of action by adopting a quantifiable shape test or to eliminate the cause of action entirely. Because even a truncated *Shaw* would rest on the untenable foundation I have described, and the supposed, expressive harm *Shaw* seeks to remedy is unlikely to justify the disruption that even a modified *Shaw* would invite, there is presently no good reason that the Court's withdrawal from the presently untenable state of the law should not be complete. While I take the commands of *stare decisis* very seriously, the problems with *Shaw* and its progeny are themselves very serious. The Court has been unable to provide workable standards, the chronic uncertainty has begotten no discernible reliance, and the costs of persisting doubt about the limits of state discretion and state responsibility are high.

There is, indeed, an added reason to admit *Shaw*'s failure in providing a manageable constitutional standard and to allow for some faith in the political process. That process not only evolved the very traditional districting principles that the Court has pledged to preserve, but has applied them in the past to deal with ethnicity in a way that should influence our thinking about the prospects for race. It is difficult to see how the consideration of race that *Shaw* condemns (but cannot avoid) is essentially different from the consideration of ethnicity that entered American politics from the moment that immigration began to temper regional homogeneity. Recognition of the ethnic character of neighborhoods and incumbents, through the application of just those districting principles we now view as traditional, allowed ethnically identified voters and their preferred candidates to enter the mainstream of American politics, see *Miller, supra,* at 944–945 (GINSBURG, J., dissenting); D. Judd, The Politics of American Cities: Private Power and Public Policy 70 (3d ed. 1988); see generally S. Erie, Rainbow's End: Irish-Americans and the Dilemmas of Urban Machine Politics, 1840–1985 (1988), and to attain a level of political power in American democracy. The result has been not a state regime of ethnic apartheid, but ethnic participation and even a moderation of ethnicity's divisive effect in political practice. For although consciousness of ethnicity has not disappeared from the

American electorate, its talismanic force does appear to have cooled over time.[9] It took Boston Irish voters, for example, to elect Thomas Menino mayor in 1993.[10]

---

[9] See Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N. C. L. Rev. 303, 347, 350 (1986) ("[T]he surest path to assimilation is participation in the larger society's activities and institutions. Voting is not just an expression of political preferences; it is an assertion of belonging to a political community. . . ." "When legislative districts are defined in ways that exclude the possibility of significant minority representation, potential minority voters see that their votes are not worth casting. Yet electoral mobilization is vital . . . to the group members' perceptions that they belong to the community"); Walzer, Pluralism in Political Perspective, in The Politics of Ethnicity 1, 18 (S. Thernstrom, A. Orlov, & O. Handlin eds. 1982) ("[P]olitical life is in principle open, and this openness has served to diffuse the most radical forms of ethnic competition"); Kantowicz, Voting and Parties, in The Politics of Ethnicity, *supra,* at 29, 45 (noting that political successes and recognition made members of an ethnic group "feel that it belonged in the wider society . . . [and brought] them inside the political system"); Mintz, Ethnicity and Leadership: An Afterword, in Ethnic Leadership in America 198 (J. Higham ed. 1978) (concluding after reviewing several studies of ethnic politics that "we ignore at our peril the need to understand those processes by which being short-changed . . . politically can become any group's motto or battle standard"); cf. Karlan, Our Separatism 102 ("two generations of communist suppression and ethnic and religious tension in Yugoslavia did little to ensure stability, tolerance, or integration").

[10] See, *e. g.,* Nolan, Boston Mayoral Race Could Break Dominance of Ethnicity, Boston Globe, Apr. 9, 1993, p. 40 ("When Boston finishes choosing a new mayor, the city may discover that after centuries of immigration, ethnicity is no longer the dominant factor in its politics"); Black, Once-Solid Voting Blocks are Splitting in Boston, Boston Globe, Nov. 1, 1993, p. 1 (commenting that voters consider Menino's Italian descent "little more than a historical footnote" and observing that "ethnic voting has faded . . . [a]s various groups enter the American economic and social mainstream . . . [and] gain some semblance of [political] power"); D'Innocenzo, Gulotta Can't Count on Ethnicity, Newsday, Oct. 19, 1993, p. 97 (noting that "[t]he vowel at the end of Tom Gulotta's name may not matter in this year's county executive election as it once did" because "Italian-Americans in Nassau County are likely to go to the polls with more than ethnic favoritism in mind"; attributing the decline in ethnicity-based voting to the

There is, then, some reason to hope that if vote dilution is attacked at the same time that race is given the recognition that ethnicity has historically received in American politics, the force of race in politics will also moderate in time. There are even signs that such hope may be vindicated, even if the evidence is necessarily tentative as yet. See U. S. Comm'n on Civil Rights, The Voting Rights Act: Ten Years After, p. 155 (Jan. 1975) ("In many areas the great increase in minority registration and voting since the passage of the Voting Rights Act in 1965 has meant that politicians can no longer afford to ignore minority voters. This has brought about a significant decline in racial appeals by candidates and has made incumbents and candidates more responsive to minority needs"); Carsey, The Contextual Effects of Race on White Voter Behavior: The 1989 New York City Mayoral Election, 57 J. of Politics 221, 228 (1995) (reporting, in 1994, that "the contextual effects of race may not be so different from the contextual effects of factors like partisanship, ethnicity, or social class as we might have believed"); Sigelman, Sigelman, Walkosz, & Nitz, Black Candidates, White Voters: Understanding Racial Bias in Political Perceptions, 39 Am. J. of Political Science 243, 244 (1995) ("Over the years, white Americans have expressed increasing willingness to vote for black candidates"); Peirce, Fresh Air in City Hall, Baltimore Sun, Nov. 8, 1993, p. 7A ("In contest after contest, victory has gone to mayoral candidates who eschew talk of race"); see also *Gingles*, 478 U. S., at 56 (noting that crossover voting in favor of minority candidates is more common when minority incumbents stand for reelection); *Collins* v. *Norfolk*, 883 F. 2d 1232, 1243 (CA4 1989) (same). This possibility that racial politics, too, may grow wiser so long as minority votes are rescued from submergence should be considered in determining how far the Fourteenth and Fifteenth Amendments require us to devise constitutional common law to supplant

---

fact that "Nassau Italian-Americans feel less marginali[zed] as an ethnic group").

the democratic process with litigation in federal courts. It counsels against accepting the profession that *Shaw* has yet evolved into a manageable constitutional standard, and from that case's invocation again today I respectfully dissent.

REPORTER'S NOTE

The next page is purposely numbered 1101. The numbers between 1077 and 1101 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 20 THROUGH JUNE 13, 1996

MARCH 20, 1996

Dismissal Under Rule 46

No. 95–928. ATHERTON ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR CITY SAVINGS, F. S. B. C. A. 3d Cir. Certiorari dismissed as to Marshall M. Criser, Alfred J. Hedden, and Gilbert G. Roessner under this Court's Rule 46. Reported below: 57 F. 3d 1231.

MARCH 25, 1996

Certiorari Granted—Vacated and Remanded

No. 95–7254. SMITH *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bailey* v. *United States,* 516 U. S. 137 (1995). Reported below: 62 F. 3d 1415.

Miscellaneous Orders

No. A–447 (95–1498). HILL *v.* DEPARTMENT OF THE AIR FORCE ET AL. C. A. 10th Cir. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D–1626. IN RE DISBARMENT OF SOKOLOW. Disbarment entered. [For earlier order herein, see 516 U. S. 1038.]

No. D–1629. IN RE DISBARMENT OF CLAPP. Disbarment entered. [For earlier order herein, see 516 U. S. 1039.]

No. D–1632. IN RE DISBARMENT OF MURACA. Disbarment entered. [For earlier order herein, see 516 U. S. 1090.]

No. D–1633. IN RE DISBARMENT OF CONNICK. Disbarment entered. [For earlier order herein, see 516 U. S. 1090.]

No. D–1636. IN RE DISBARMENT OF TINSLEY. Disbarment entered. [For earlier order herein, see 516 U. S. 1090.]

No. D–1637. In re Disbarment of Noxon. Disbarment entered. [For earlier order herein, see 516 U. S. 1090.]

No. 95–345. United States *v.* Ursery. C. A. 6th Cir. [Certiorari granted, 516 U. S. 1070]; and

No. 95–346. United States *v.* $405,089.23 in United States Currency et al. C. A. 9th Cir. [Certiorari granted, 516 U. S. 1070.] Motion of respondents for divided argument and for additional time for oral argument granted. Twenty additional minutes are allotted for that purpose, and the time for oral argument is to be divided as follows: 40 minutes, the Solicitor General; 20 minutes, respondent Ursery; 20 minutes, respondents $405,089.23 et al.

No. 95–719. Gasperini *v.* Center for Humanities, Inc. C. A. 2d Cir. [Certiorari granted, 516 U. S. 1086.] Motion of Association of Trial Lawyers of America for leave to file a brief as *amicus curiae* granted.

No. 95–1176. Palmer Communications, Inc., et al. *v.* Total TV. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 95–7849. In re Trentz. Petition for writ of mandamus denied.

Certiorari Granted

No. 95–813. Bennett et al. *v.* Plenert et al. C. A. 9th Cir. Certiorari granted. Reported below: 63 F. 3d 915.

No. 95–966. O'Gilvie et al., Minors *v.* United States; and

No. 95–977. O'Gilvie *v.* United States. C. A. 10th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 66 F. 3d 1550.

No. 95–974. Arizonans for Official English et al. *v.* Arizona et al. C. A. 9th Cir. Motions of Equal Opportunity Foundation and U. S. English, Inc., for leave to file briefs as *amici curiae* granted. Certiorari granted. In addition to the questions presented by the petition, the parties are requested to brief and argue the following questions: "(1) Do petitioners have standing to maintain this action? (2) Is there a case or controversy with respect to respondent Yniguez?" Reported below: 69 F. 3d 920.

Certiorari Denied

No. 95–376. UNISYS CORP. *v.* PICKERING ET AL.; and
No. 95–593. PICKERING ET AL. *v.* UNISYS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 57 F. 3d 1255.

No. 95–781. BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSN., SUCCESSOR-BY-MERGER TO SECURITY PACIFIC NATIONAL BANK, TRUSTEE *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SANTA BARBARA SAVINGS AND LOAN ASSN. C. A. 9th Cir. Certiorari denied. Reported below: 63 F. 3d 900.

No. 95–816. MIER *v.* VAN DYKE, ADJUTANT GENERAL, ARIZONA ARMY NATIONAL GUARD, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 57 F. 3d 747.

No. 95–845. WHITE *v.* CITY OF TAYLOR ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 65 F. 3d 169.

No. 95–955. GORDON *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied. Reported below: 55 F. 3d 101.

No. 95–957. BRAZIL *v.* DALTON, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 66 F. 3d 193.

No. 95–969. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 66 F. 3d 220.

No. 95–970. MERCER *v.* MONZACK. C. A. 1st Cir. Certiorari denied. Reported below: 53 F. 3d 1.

No. 95–978. CARUSO ET AL. *v.* KELLY, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 122 F. 3d 1055.

No. 95–1000. HENNESSY ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK, ET AL.; and
No. 95–1002. HANNA ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 3d Cir. Certiorari denied. Reported below: 58 F. 3d 908.

No. 95–1007. WASHINGTON SUBURBAN SANITARY COMMISSION *v.* WESTFARM ASSOCIATES LIMITED PARTNERSHIP ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 66 F. 3d 669.

No. 95–1147. RAGAN *v.* CONTICOMMODITY SERVICES, INC., ET AL.; and

No. 95–1151. RAGAN *v.* CONTICOMMODITY SERVICES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 63 F. 3d 438.

No. 95–1163. WILLIS *v.* SHELBY COUNTY, TENNESSEE, INFORMATION TECHNOLOGY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 116.

No. 95–1164. FOSTER, GOVERNOR OF LOUISIANA, ET AL. *v.* HOPE MEDICAL GROUP FOR WOMEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 63 F. 3d 418.

No. 95–1167. UNITED STATES EX REL. WILLIS *v.* GENERAL DYNAMICS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 61 F. 3d 1402.

No. 95–1168. ROSEN *v.* IOWA BOARD OF MEDICAL EXAMINERS. Sup. Ct. Iowa. Certiorari denied. Reported below: 539 N. W. 2d 345.

No. 95–1170. EVANS *v.* KANSAS CITY SCHOOL DISTRICT. C. A. 8th Cir. Certiorari denied. Reported below: 65 F. 3d 98.

No. 95–1175. BRAVO ET AL. *v.* NATIONAL MEDIATION BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 70 F. 3d 637.

No. 95–1185. FORT PECK ASSINIBOINE AND SIOUX TRIBES *v.* TUBRIDY ET VIR. Sup. Ct. Ill. Certiorari denied. Reported below: 167 Ill. 2d 250, 657 N. E. 2d 935.

No. 95–1187. BERKS COUNTY ET AL. *v.* MURTAGH ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 659 A. 2d 1083.

No. 95–1196. MCLAUGHLIN ET AL. *v.* NORTH CAROLINA BOARD OF ELECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 65 F. 3d 1215.

No. 95–1199. CLINTON *v.* MIDDLESEX MUTUAL ASSURANCE CO. App. Ct. Conn. Certiorari denied. Reported below: 38 Conn. App. 555, 662 A. 2d 1319.

No. 95–1236. Bandura *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 543.

No. 95–1239. Bower *v.* Bower. Ct. App. Ohio, Sandusky County. Certiorari denied.

No. 95–1252. Mates *v.* Occupational Safety and Health Administration et al. C. A. 3d Cir. Certiorari denied. Reported below: 67 F. 3d 291.

No. 95–1274. Catalina Enterprises, Incorporated Pension Trust *v.* Hartford Fire Insurance Co. C. A. 4th Cir. Certiorari denied. Reported below: 67 F. 3d 63.

No. 95–1301. Thomson *v.* Harmony et al. C. A. 6th Cir. Certiorari denied. Reported below: 65 F. 3d 1314.

No. 95–1312. Raney *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 65 F. 3d 167.

No. 95–1324. Lyon *v.* Alabama State Bar. Sup. Ct. Ala. Certiorari denied. Reported below: 676 So. 2d 1358.

No. 95–1333. Lussier *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 71 F. 3d 456.

No. 95–1335. Hansen *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 1273.

No. 95–1337. Britton *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 68 F. 3d 262.

No. 95–1368. Saccoccia *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 63 F. 3d 1.

No. 95–1371. Hill *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1280.

No. 95–1374. Spears *v.* State Bar of Illinois. Sup. Ct. Ill. Certiorari denied.

No. 95–1383. Saccoccia *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 58 F. 3d 754.

No. 95–1386. Stepard et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 60 F. 3d 834.

No. 95–1390. NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS *v.* SURFACE TRANSPORTATION BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 70 F. 3d 638.

No. 95–1392. RUIZ-MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 1269.

No. 95–1397. ANDREWS *v.* GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 65 F. 3d 183.

No. 95–6765. BRUNNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 62 F. 3d 400.

No. 95–7119. ELGENDY ET UX. *v.* NEHEMIAH PLAN HOMES PROJECT ET AL. C. A. 2d Cir. Certiorari denied.

No. 95–7155. PATRICK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 906 S. W. 2d 481.

No. 95–7171. FAUBER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 95–7195. CARTER *v.* RUNYON, POSTMASTER GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 67 F. 3d 303.

No. 95–7222. GORMAN *v.* MCANINCH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 95–7250. KINLEY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 72 Ohio St. 3d 491, 651 N. E. 2d 419.

No. 95–7252. LAWSON *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied. Reported below: 54 F. 3d 766.

No. 95–7260. TURPIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 65 F. 3d 1207.

No. 95–7273. CROMPTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 65 F. 3d 170.

No. 95–7456. SCOTT *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 95–7464. STROWSKI *v.* BANK OF AMERICA. C. A. 9th Cir. Certiorari denied. Reported below: 60 F. 3d 834.

No. 95–7539. KEE *v.* ARGUS LIFE INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 58 F. 3d 639.

No. 95–7542. OLIVER *v.* WITKOWSKI, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 67 F. 3d 296.

No. 95–7543. SALEEM *v.* NATIONSBANC MORTGAGE CORP. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 271 Ill. App. 3d 1137, 688 N. E. 2d 151.

No. 95–7544. POLLEY ET AL. *v.* GEORGIA STATE BOARD OF PARDONS AND PAROLES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 68 F. 3d 486.

No. 95–7545. ROUSSOS *v.* ALLSTATE INSURANCE CO. Ct. Sp. App. Md. Certiorari denied. Reported below: 104 Md. App. 80, 655 A. 2d 40.

No. 95–7551. BOLLMAN *v.* EMERSON, JUDGE, DISTRICT COURT OF TEXAS, POTTER COUNTY. Sup. Ct. Tex. Certiorari denied.

No. 95–7554. CRAIG *v.* CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied. Reported below: 906 S. W. 2d 369.

No. 95–7555. ALLEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 662 So. 2d 323.

No. 95–7556. SEVIGNY ET AL. *v.* MAINE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 69 F. 3d 531.

No. 95–7562. PRICE-EL *v.* GEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1263.

No. 95–7564. SMIDDY *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 95–7565. SALES *v.* SPARKS ET AL. C. A. 6th Cir. Certiorari denied.

No. 95–7569. VARGAS *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 310.

No. 95–7570. COOPER *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 65 F. 3d 172.

No. 95–7572. Tate *v.* James, Governor of Alabama, et al. C. A. 11th Cir. Certiorari denied.

No. 95–7576. Gregory *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 340 N. C. 365, 459 S. E. 2d 638.

No. 95–7590. Howell *v.* Koch et al. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 548.

No. 95–7591. DeLeon *v.* San Antonio Independent School District et al. C. A. 5th Cir. Certiorari denied. Reported below: 68 F. 3d 465.

No. 95–7593. Gilbert *v.* San Francisco Bay Area Rapid Transit District et al. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–7594. McCarthy *v.* Kansas City, Missouri. C. A. 8th Cir. Certiorari denied.

No. 95–7595. Morris *v.* School Board of the City of Norfolk, Virginia, et al. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 112.

No. 95–7596. Lucien *v.* Washington, Director, Illinois Department of Corrections, et al. C. A. 7th Cir. Certiorari denied. Reported below: 69 F. 3d 539.

No. 95–7597. Murray, aka Hines *v.* Roach, Warden, et al. C. A. D. C. Cir. Certiorari denied.

No. 95–7600. Kowalski *v.* Oregon State Bar et al. C. A. 9th Cir. Certiorari denied.

No. 95–7601. McBride *v.* Thompson, Warden, et al. C. A. 11th Cir. Certiorari denied. Reported below: 65 F. 3d 183.

No. 95–7610. Porter *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 321 Ark. 555, 905 S. W. 2d 835.

No. 95–7612. Vargas *v.* Garner, Chairman, Georgia Board of Pardons and Paroles, et al. Sup. Ct. Ga. Certiorari denied. Reported below: 266 Ga. 141, 465 S. E. 2d 275.

No. 95–7618. Jones *v.* Holvey et al. C. A. 3d Cir. Certiorari denied. Reported below: 70 F. 3d 1256.

No. 95–7620. Claudio et al. *v.* Snyder, Warden, et al. C. A. 3d Cir. Certiorari denied. Reported below: 68 F. 3d 1573.

No. 95–7623. Fields *v.* Carnahan et al. C. A. 8th Cir. Certiorari denied.

No. 95–7626. Hill *v.* Schroubroek et al. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 1266.

No. 95–7635. Cooper *v.* Malone et al. C. A. 8th Cir. Certiorari denied. Reported below: 65 F. 3d 172.

No. 95–7638. Bennett *v.* Texas. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 95–7639. Colbert *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 95–7642. Simpson *v.* Cristino Rivera Mining Co. et al. Ct. App. N. M. Certiorari denied.

No. 95–7647. Sobin *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 664 So. 2d 254.

No. 95–7649. Walker *v.* Iowa. Dist. Ct. Iowa, Story County. Certiorari denied.

No. 95–7650. Platzer *v.* Barbour, Superintendent, Twin Rivers Corrections Center. C. A. 9th Cir. Certiorari denied. Reported below: 61 F. 3d 912.

No. 95–7655. Hinkle et al. *v.* Janklow, Governor of South Dakota. C. A. 8th Cir. Certiorari denied.

No. 95–7656. Jones *v.* Bowersox, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 56 F. 3d 878.

No. 95–7657. Batista *v.* Buffalo Police Department et al. C. A. 2d Cir. Certiorari denied. Reported below: 122 F. 3d 1055.

No. 95–7658. Ramey *v.* Ashland Oil, Inc. Cir. Ct. Cabell County, W. Va. Certiorari denied.

No. 95–7662. Martin *v.* Hill, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 53 F. 3d 339.

No. 95–7663. Amos *v.* Esmor Mansfield, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 68 F. 3d 467.

No. 95–7664. Bragg *v.* Bartlett, Superintendent, Elmira Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 95–7676. Di Jorio *v.* California et al. C. A. 9th Cir. Certiorari denied.

No. 95–7678. Dunn *v.* Singletary, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 95–7679. Woods *v.* Purkett, Superintendent, Farmington Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 67 F. 3d 304.

No. 95–7682. McCarver *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 341 N. C. 364, 462 S. E. 2d 25.

No. 95–7684. Jennings *v.* Haws, Warden, et al. C. A. 7th Cir. Certiorari denied. Reported below: 67 F. 3d 301.

No. 95–7700. Salazar *v.* Norton, Attorney General of Colorado, et al. C. A. 10th Cir. Certiorari denied. Reported below: 72 F. 3d 138.

No. 95–7713. Oliver *v.* Texas. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 95–7759. Sheppard *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 250 Va. 379, 464 S. E. 2d 131.

No. 95–7766. Trivedi *v.* Department of Defense et al. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 545.

No. 95–7789. Sudranski *v.* Brown, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 57 F. 3d 1083.

No. 95–7795. Fry *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 250 Va. 413, 463 S. E. 2d 433.

No. 95–7818. Gonzalez *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 69 F. 3d 531.

No. 95–7845. Hadley *v.* Washington, Director, Illinois Department of Corrections, et al. C. A. 7th Cir. Certiorari denied. Reported below: 70 F. 3d 117.

No. 95–7856. Misek-Falkoff *v.* International Business Machines Corp. C. A. 2d Cir. Certiorari denied. Reported below: 60 F. 3d 811.

No. 95–7876. Sellers *v.* Boyd et al. C. A. 5th Cir. Certiorari denied. Reported below: 68 F. 3d 469.

No. 95–7888. Downs *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 878.

No. 95–7889. Hauser *v.* Internal Revenue Service. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 1284.

No. 95–7901. Booker *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 70 F. 3d 488.

No. 95–7902. Bryant *v.* United States; and
No. 95–7994. Davis *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 68 F. 3d 1283.

No. 95–7908. Daas *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 67 F. 3d 300.

No. 95–7911. Blair *v.* Idaho. Ct. App. Idaho. Certiorari denied.

No. 95–7913. Ross *v.* Norton, Attorney General of Colorado, et al. C. A. 10th Cir. Certiorari denied. Reported below: 61 F. 3d 916.

No. 95–7916. Antonelli *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 274 Ill. App. 3d 1102, 691 N. E. 2d 1196.

No. 95–7921. Hendricks *v.* Calderon, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1032.

No. 95–7922. Powell *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1281.

No. 95–7935. Sears *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 55 F. 3d 1525.

No. 95–7936. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 65 F. 3d 932.

No. 95–7943. CASTRO-VEGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 62 F. 3d 1425.

No. 95–7945. SPRIGGS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 95–7948. OWENS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 72 F. 3d 134.

No. 95–7949. SHORB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 59 F. 3d 177.

No. 95–7950. ST. CLAIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1281.

No. 95–7951. RODRIGUEZ-SOLEL BOTELLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 78.

No. 95–7954. BURKE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 73 Ohio St. 3d 399, 653 N. E. 2d 242.

No. 95–7965. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 67 F. 3d 300.

No. 95–7966. RELIFORD *v.* HODGES, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 61 F. 3d 30.

No. 95–7967. LANE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 66 F. 3d 317.

No. 95–7971. MULLENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 65 F. 3d 1560.

No. 95–7972. MILLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 60 F. 3d 826.

No. 95–7973. MEEKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 69 F. 3d 742.

No. 95–7975. MAYLES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 70 F. 3d 1256.

No. 95–7982. Starks *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 72 F. 3d 920.

No. 95–7985. Stevens *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 67 F. 3d 298.

No. 95–7987. Brown *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 1269.

No. 95–7988. Johnson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 71 F. 3d 539.

No. 95–7989. Ayars et ux. *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 95–7995. Nelson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 879.

No. 95–7997. Easley *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 70 F. 3d 65.

No. 95–7999. Earl *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 877.

No. 95–8000. Frank *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1280.

No. 95–8002. Murray *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 67 F. 3d 687.

No. 95–8004. Richey *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 878.

No. 95–8006. Pacheco-Rodriguez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 71 F. 3d 881.

No. 95–8007. Pearson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 77 F. 3d 497.

No. 95–8010. Bryant *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 66 F. 3d 339.

No. 95–8011. Zzie *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 72 F. 3d 887.

No. 95–8012. Zzie *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 72 F. 3d 887.

No. 95–8016. JOSEPH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 71 F. 3d 882.

No. 95–8019. AREVALO-GAMBOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 545.

No. 95–8021. SCOTT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 107 F. 3d 5.

No. 95–8022. BUCHANAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 818.

No. 95–8023. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 70 F. 3d 979.

No. 95–8026. GOMEZ TOLEDO, AKA MARTINEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 70 F. 3d 988.

No. 95–8027. VILLABONA-GARNICA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 63 F. 3d 1051.

No. 95–8029. GONZALEZ-LERMA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 71 F. 3d 1537.

No. 95–8030. GOBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1280.

No. 95–8032. FRAISER *v.* UNITED STATES; and DUMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 66 F. 3d 336 (first judgment); 64 F. 3d 1427 (second judgment).

No. 95–8033. HARDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1263.

No. 95–8034. GARDNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 72 F. 3d 124.

No. 95–8035. HASSAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 113.

No. 95–8039. SCHAKE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 70 F. 3d 1258.

No. 95–8040. SHERROW *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 465.

No. 95–8047. Barraza *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 95–8049. Windle *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 74 F. 3d 997.

No. 95–8054. Lawhorn *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1263.

No. 95–8055. Kwong *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 69 F. 3d 663.

No. 95–8056. Martinez-Martinez *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 69 F. 3d 1215.

No. 95–8066. Horton *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 70 F. 3d 1276.

No. 95–8095. Campbell *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 1273.

No. 95–8097. DeLeon-Rodriguez *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 70 F. 3d 764.

No. 95–8098. Fox *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 62 F. 3d 400.

No. 95–8105. Johnson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 74 F. 3d 1236.

No. 95–817. Norris, Director, Arkansas Department of Correction *v.* Robinson. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 60 F. 3d 457.

No. 95–1008. Hewlett-Packard Co. *v.* Datagate, Inc. C. A. 9th Cir. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition. Reported below: 60 F. 3d 1421.

Rehearing Denied

No. 95–864. Maresca *v.* Commissioner of Patents and Trademarks, 516 U. S. 1075;

No. 95–935. Ram *v.* De Galan et al., 516 U. S. 1116;

No. 95–6791. Hall *v.* Groose, Superintendent, Jefferson City Correctional Center, et al., 516 U. S. 1080;

No. 95–6885. ECHOLS *v.* THOMAS, WARDEN, 516 U. S. 1096;
No. 95–6948. CHAVEZ *v.* UNITED STATES, 516 U. S. 1065;
No. 95–6979. ROSELIN *v.* BOARD OF PATENT APPEALS AND INTERFERENCES, 516 U. S. 1097; and
No. 95–7492. SPAGNOULO *v.* UNITED STATES, 516 U. S. 1138. Petitions for rehearing denied.

APRIL 1, 1996

Certiorari Granted—Vacated and Remanded

No. 94–2130. FIRST ADVANTAGE INSURANCE, INC., ET AL. *v.* GREEN, LOUISIANA COMMISSIONER OF INSURANCE, ET AL. Ct. App. La., 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Barnett Bank of Marion County, N. A.* v. *Nelson*, *ante*, p. 25. Reported below: 652 So. 2d 562.

No. 94–7980. WINGO *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rutledge* v. *United States*, *ante*, p. 292; and *Bailey* v. *United States*, 516 U. S. 137 (1995). Reported below: 39 F. 3d 1182.

No. 94–7981. WINGO *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bailey* v. *United States*, 516 U. S. 137 (1995). Reported below: 39 F. 3d 1182.

No. 95–296. MCLEOD *v.* OREGON LITHOPRINT, INC., DBA NEWS-REGISTER PUBLISHING CO., ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Varity Corp.* v. *Howe*, 516 U. S. 489 (1996). JUSTICE SCALIA would deny certiorari. Reported below: 46 F. 3d 956.

No. 95–7315. AIKENS *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bailey* v. *United States*, 516 U. S. 137 (1995). Reported below: 64 F. 3d 372.

Miscellaneous Orders. (See also Nos. 95–7587, 95–7588, and 95–7589, *ante*, p. 343.)

No. D–1662. IN RE DISBARMENT OF BRINKLEY. Crawford Wray Brinkley, of Conyers, Ga., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1663. IN RE DISBARMENT OF SEIKEL. Harold Hans Seikel, of Garden City Park, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1664. IN RE DISBARMENT OF SEAMAN. John Tad Seaman, of New Windsor, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1665. IN RE DISBARMENT OF MICCI. Eugene D. Micci, of Derby, Conn., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1666. IN RE DISBARMENT OF O'KICKI. Joseph F. O'Kicki, of Portage, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–49. BENOIT *v.* LOUISIANA PUBLIC SERVICE COMMISSION ET AL.;

No. M–50. MARTIN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION; and

No. M–51. DELBRUEGGE *v.* CYTRON ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 95–489. COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION. C. A. 10th Cir. [Certiorari granted, 516 U. S. 1036.] Motion of Brennan Center for Justice for leave to file a brief as *amicus curiae* granted.

No. 95–754. Medtronic, Inc. *v.* Lohr et vir; and
No. 95–886. Lohr et vir *v.* Medtronic, Inc. C. A. 11th Cir. [Certiorari granted, 516 U. S. 1087.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 95–809. Lockheed Corp. et al. *v.* Spink. C. A. 9th Cir. [Certiorari granted, 516 U. S. 1087.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 95–860. Smiley *v.* Citibank (South Dakota), N. A. Sup. Ct. Cal. [Certiorari granted, 516 U. S. 1087.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 95–865. United States *v.* Winstar Corp. et al. C. A. Fed. Cir. [Certiorari granted, 516 U. S. 1087.] Motion of respondents for divided argument granted.

No. 95–7693. Jones *v.* American Civil Liberties Union Foundation et al. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until April 22, 1996, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 95–7358. In re Ballard et al. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 95–1201. Lopez et al. *v.* Monterey County, California, et al. Appeal from D. C. N. D. Cal. Probable jurisdiction noted.

Certiorari Granted

No. 95–853. M. L. B. *v.* S. L. J., Individually and as Next Friend of the Minor Children, S. L. J. and M. L. J., et ux. Sup. Ct. Miss. Certiorari granted.

No. 95–1232. General Motors Corp. *v.* Tracy, Tax Commissioner of Ohio. Sup. Ct. Ohio. Motion of Committee on State Taxation for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 73 Ohio St. 3d 29, 652 N. E. 2d 188.

Certiorari Denied

No. 95–74. Stephens, Commissioner, Kentucky Department of Insurance, et al. *v.* Owensboro National Bank et al. C. A. 6th Cir. Certiorari denied. Reported below: 44 F. 3d 388.

No. 95–836. Posner, a Minor, by His Parent, Posner *v.* Central Synagogue et al. C. A. 2d Cir. Certiorari denied. Reported below: 57 F. 3d 1064.

No. 95–887. Waymer *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 55 F. 3d 564.

No. 95–997. Mertz *v.* City of Key West. C. A. 11th Cir. Certiorari denied. Reported below: 66 F. 3d 341.

No. 95–1035. Werner et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 68 F. 3d 486.

No. 95–1041. Reyes et al. *v.* Lugo. C. A. 5th Cir. Certiorari denied. Reported below: 68 F. 3d 472.

No. 95–1043. Kennedy *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 61 F. 3d 494.

No. 95–1047. Noble et al. *v.* Columbia County Redevelopment Authority. Commw. Ct. Pa. Certiorari denied. Reported below: 658 A. 2d 481.

No. 95–1059. Richey *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 73 Ohio St. 3d 523, 653 N. E. 2d 344.

No. 95–1063. Blount *v.* Securities and Exchange Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 61 F. 3d 938.

No. 95–1079. Meyer *v.* National Solid Wastes Management Assn. et al. C. A. 7th Cir. Certiorari denied. Reported below: 63 F. 3d 652.

No. 95–1080. Petereit et al. *v.* S. B. Thomas, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 63 F. 3d 1169.

No. 95–1086. DISTAJO ET AL. *v.* DOCTOR'S ASSOCIATES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 66 F. 3d 438.

No. 95–1123. GODBY *v.* ELECTROLUX CORP. C. A. 11th Cir. Certiorari denied. Reported below: 58 F. 3d 641.

No. 95–1186. NEW HAMPSHIRE MOTOR TRANSPORT ET AL. *v.* TOWN OF PLAISTOW. C. A. 1st Cir. Certiorari denied. Reported below: 67 F. 3d 326.

No. 95–1194. PELOQUIN *v.* UNITED OF OMAHA LIFE INSURANCE CO. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 660 So. 2d 1069.

No. 95–1202. HARTSELL, A MINOR, BY NEXT FRIEND, UPTON *v.* FORT SANDERS REGIONAL MEDICAL CENTER ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 905 S. W. 2d 944.

No. 95–1211. NICIT *v.* NICIT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 217 App. Div. 2d 1006, 631 N. Y. S. 2d 271.

No. 95–1212. BOLT *v.* STATE FARM FIRE & CASUALTY CO. C. A. 9th Cir. Certiorari denied.

No. 95–1213. DELOATCH *v.* HUGHES. C. A. 4th Cir. Certiorari denied. Reported below: 65 F. 3d 166.

No. 95–1216. COOK ET AL. *v.* CITY OF CINCINNATI ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: 103 Ohio App. 3d 80, 658 N. E. 2d 814.

No. 95–1217. DUSHAW *v.* ROADWAY EXPRESS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 66 F. 3d 129.

No. 95–1218. ALLIGATOR FARMS, INC., ET AL. *v.* GRONER ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 656 So. 2d 62.

No. 95–1227. LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT *v.* DOUCET ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 657 So. 2d 92.

No. 95–1247. ROSENBERG, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE GOODS OF ROSENBERG, DECEASED *v.* WACHT-

LER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 89 F. 3d 825.

No. 95–1250. DOLCEFINO *v.* RAY. Sup. Ct. Tex. Certiorari denied.

No. 95–1260. EAGERTON, ALABAMA COMMISSIONER OF REVENUE, ET AL. *v.* OWNER-OPERATOR INDEPENDENT DRIVERS ASSN., INC., ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 671 So. 2d 674.

No. 95–1296. TALLEY *v.* FLATHEAD VALLEY COMMUNITY COLLEGE ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 273 Mont. 336, 903 P. 2d 789.

No. 95–1300. CRAWFORD ET AL. *v.* ROANE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 53 F. 3d 750.

No. 95–1332. SILVA *v.* CITY OF MADISON, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 69 F. 3d 1368.

No. 95–1338. TSE ET AL. *v.* SCHWARZSCHILD. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 293.

No. 95–1356. TRUJILLO *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 274 Ill. App. 3d 1119, 691 N. E. 2d 1204.

No. 95–1358. HESS *v.* MACASKILL, DIRECTOR, WOMEN'S CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 307.

No. 95–1366. HANLIN ET VIR *v.* SUPERIOR COURT OF CALIFORNIA, SANTA CLARA COUNTY (AMERICAN GENERAL FINANCE, INC., REAL PARTY IN INTEREST). Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 95–1370. CARR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 69 F. 3d 536.

No. 95–1401. LIBUTTI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 72 F. 3d 124.

No. 95–1409. ESTACIO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 64 F. 3d 477.

No. 95–1433. FIELDS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 72 F. 3d 887.

No. 95–6830. Smith *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 1268.

No. 95–6897. Roberts *v.* Chater, Commissioner of Social Security. C. A. 9th Cir. Certiorari denied. Reported below: 66 F. 3d 179.

No. 95–7176. Bracey *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 541 Pa. 322, 662 A. 2d 1062.

No. 95–7290. Ernesto Espinosa *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 66 F. 3d 322.

No. 95–7302. Cullum *v.* Hawk, Director, Bureau of Prisons, et al. C. A. 7th Cir. Certiorari denied. Reported below: 67 F. 3d 301.

No. 95–7313. Nakamoto *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 310.

No. 95–7316. Franklin *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 167 Ill. 2d 1, 656 N. E. 2d 750.

No. 95–7319. Jones *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 899 P. 2d 635.

No. 95–7336. Townzen *v.* County of El Dorado, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 60 F. 3d 835.

No. 95–7374. Dingle *v.* Victory Savings Bank et al. Sup. Ct. Cal. Certiorari denied.

No. 95–7414. Salzer *v.* Dellinger et al. C. A. 7th Cir. Certiorari denied. Reported below: 54 F. 3d 779.

No. 95–7530. Johnson *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 68 F. 3d 106.

No. 95–7673. Smith *v.* Hargett, Superintendent, Mississippi State Penitentiary. C. A. 5th Cir. Certiorari denied. Reported below: 68 F. 3d 472.

No. 95–7681. Silverburg *v.* Ashley, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 66 F. 3d 326.

No. 95–7696. DEBBS ET UX. *v.* CALIFORNIA WORKERS' COMPENSATION APPEALS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 60 F. 3d 832.

No. 95–7698. PAGE ET AL. *v.* TEXAS BOARD OF PARDONS AND PAROLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 68 F. 3d 472.

No. 95–7701. COTNER *v.* NICHOLS. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 547.

No. 95–7702. BOWEN *v.* GUNDY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 115.

No. 95–7709. BURR *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 341 N. C. 263, 461 S. E. 2d 602.

No. 95–7714. RODRIGUEZ *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 657 So. 2d 1166.

No. 95–7718. WALKER *v.* CITY OF AMES, IOWA. Dist. Ct. Iowa, Story County. Certiorari denied.

No. 95–7724. BANKS *v.* COUNTY OF SAN DIEGO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–7729. FRYE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 341 N. C. 470, 461 S. E. 2d 664.

No. 95–7731. BRITO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 95–7735. FREE *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 95–7749. WINTERS *v.* OHIO ADULT PAROLE AUTHORITY. C. A. 6th Cir. Certiorari denied.

No. 95–7752. SALAZAR *v.* ARIZONA. Super. Ct. Ariz., Pima County. Certiorari denied.

No. 95–7756. TOOTLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 65 F. 3d 381.

No. 95–7760. SAATHOFF *v.* HESSE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 72 F. 3d 138.

No. 95–7771. SHARP *v.* CAWLEY. Ct. App. Va. Certiorari denied. Reported below: 19 Va. App. 709, 453 S. E. 2d 580.

No. 95–7774. MACK *v.* SKUPNIEWITZ, CLERK, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 73 F. 3d 702.

No. 95–7785. JACKSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 95–7821. BROWN *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 60 F. 3d 820.

No. 95–7829. OXFORD *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 59 F. 3d 741.

No. 95–7872. PATIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 95–7881. GUZMAN ZAYAS *v.* BROWN, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 73 F. 3d 378.

No. 95–7884. CALDWELL *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 322 Ark. 543, 910 S. W. 2d 667.

No. 95–7892. GRAVES *v.* UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT. C. A. Fed. Cir. Certiorari denied. Reported below: 69 F. 3d 1147.

No. 95–7912. PATTERSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–7927. MITCHELL *v.* BILBY-KNIGHT. C. A. 5th Cir. Certiorari denied. Reported below: 56 F. 3d 1384.

No. 95–7942. CASARES *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 95–7979. BRIGGS *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 42 M. J. 367.

No. 95–7996. FORD *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 539 N. W. 2d 214.

No. 95–8003. SARTIN *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 67 F. 3d 296.

No. 95–8018. BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 64 F. 3d 659.

No. 95–8020. BAPTISTE *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 95–8036. HAMILL *v.* FERGUSON, WARDEN, ET AL. Sup. Ct. Wyo. Certiorari denied.

No. 95–8037. FELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 878.

No. 95–8046. SAUNDERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 66 F. 3d 318.

No. 95–8048. AKECH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 72 F. 3d 122.

No. 95–8050. RELIFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 95–8051. RELIFORD *v.* SCOTT, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 1285.

No. 95–8070. DIXON *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 306.

No. 95–8099. SHELTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 66 F. 3d 991.

No. 95–8100. BYRD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 68 F. 3d 457.

No. 95–8104. JENNINGS *v.* UNITED STATES; and
No. 95–8109. JENNINGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 72 F. 3d 887.

No. 95–8106. MATTHEWS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1264.

No. 95–8117. Coupar *v.* Turnbo, Regional Director, Federal Bureau of Prisons, South Central Region. C. A. 5th Cir. Certiorari denied.

No. 95–8119. Sinis *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 89 F. 3d 826.

No. 95–8120. Bergmann *v.* McCaughtry, Warden. Ct. App. Wis. Certiorari denied. Reported below: 197 Wis. 2d 956, 543 N. W. 2d 867.

No. 95–8122. Castner *v.* Whalen, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 72 F. 3d 137.

No. 95–8123. Bullock *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 171.

No. 95–8126. Blackman et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 66 F. 3d 1572.

No. 95–8127. Bell *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 126.

No. 95–8129. Riggio *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 336.

No. 95–8133. Bonner *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 818.

No. 95–8139. Underwood *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 67 F. 3d 301.

No. 95–8140. Winter *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 70 F. 3d 655.

No. 95–8144. Munoz *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 63 F. 3d 1051.

No. 95–8145. McCarthy *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 72 F. 3d 124.

No. 95–8151. Mauro *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 67 F. 3d 292.

No. 95–8155. Becker *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 67 F. 3d 292.

No. 95–8159. McBride *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 74 F. 3d 1229.

No. 95–8162. Priore *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 70 F. 3d 1258.

No. 95–8163. Scott *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 310.

No. 95–8164. Tamakloe *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 72 F. 3d 124.

No. 95–8165. Trueblood *v.* United States et al. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 474.

No. 95–8169. Hufstetler *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 74 F. 3d 1238.

No. 95–8170. Balderas Garcia *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 72 F. 3d 130.

No. 95–8171. Escamilla *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 835.

No. 95–8172. Elliott *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 74 F. 3d 1237.

No. 95–8173. Ferrer *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1251.

No. 95–8174. Hart *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 854.

No. 95–8175. Hutching *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 1273.

No. 95–8176. Golb *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 1417.

No. 95–8178. McKenzie *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 659 A. 2d 838.

No. 95–8179. Nolan *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 55 F. 3d 1525.

No. 95–8180. Jackson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 72 F. 3d 128.

No. 95–8184. Watts *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 790.

No. 95–8185. Urena-Vasquez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1281.

No. 95–8186. Thomas *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 575.

No. 95–8187. Usry *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 1269.

No. 95–8194. Coleman *v.* Hofbauer, Warden. C. A. 6th Cir. Certiorari denied.

No. 95–1190. McClaran, Director, Child Support Services, Tennessee Department of Human Services *v.* Davis et al. Sup. Ct. Tenn. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 909 S. W. 2d 412.

No. 95–1205. Idaho *v.* Lankford. Sup. Ct. Idaho. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 127 Idaho 608, 903 P. 2d 1305.

No. 95–1219. Newman *v.* Consolidation Coal Co. C. A. 3d Cir. Motion of petitioner for leave to proceed as a seaman granted. Certiorari denied.

No. 95–1221. Hyman *v.* Virginia Department of Taxation. Sup. Ct. Va. Motion of M. Patton Echols, Jr., and Barbara B. Tanes to be substituted in place of Joseph B. Hyman, deceased, granted. Certiorari denied.

Rehearing Denied

No. 95–630. Baird *v.* United States, 516 U. S. 1111;
No. 95–934. Johnson *v.* Johnson et al., 516 U. S. 1115;
No. 95–6957. Halstead *v.* Florida et al., 516 U. S. 1123;
No. 95–7006. In re Craig, 516 U. S. 1110; and
No. 95–7120. Hernandez *v.* New Mexico et al., 516 U. S. 1126. Petitions for rehearing denied.

APRIL 9, 1996

Dismissal Under Rule 46

No. 95–1487. ALTSTATT *v.* OREGON STATE BAR. Sup. Ct. Ore. Certiorari dismissed under this Court's Rule 46.1. Reported below: 321 Ore. 324, 897 P. 2d 1164.

Miscellaneous Order. (See No. A–828, *ante*, p. 345.)

APRIL 10, 1996

Certiorari Denied

No. 95–8560 (A–832). WILLIAMS *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 82 F. 3d 781.

APRIL 15, 1996

Dismissal Under Rule 46

No. 95–1230. BELLSOUTH TELECOMMUNICATIONS, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari dismissed as to Telephone Utilities Exchange Carrier Association under this Court's Rule 46. Reported below: 59 F. 3d 1407.

Certiorari Granted—Vacated and Remanded

No. 94–357. WASHINGTON ET AL. *v.* SPOKANE TRIBE OF INDIANS. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Seminole Tribe of Fla.* v. *Florida, ante*, p. 44. Reported below: 28 F. 3d 991.

No. 94–1029. OKLAHOMA *v.* PONCA TRIBE OF OKLAHOMA. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Seminole Tribe of Fla.* v. *Florida, ante*, p. 44. Reported below: 37 F. 3d 1422.

No. 94–1343. MONTANA ET AL. *v.* FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION; and

No. 94–1344. JESSUP, ADMINISTRATOR OF THE GAMING CONTROL DIVISION, ET AL. *v.* BLACKFEET TRIBE OF THE BLACKFEET RESERVATION. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Seminole Tribe of Fla.* v. *Florida*, *ante*, p. 44. Reported below: 39 F. 3d 1186.

No. 95–561. OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND ET AL. *v.* MAHERN, TRUSTEE, MERCHANTS GRAIN, INC. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Seminole Tribe of Fla.* v. *Florida*, *ante*, p. 44. Reported below: 59 F. 3d 630.

No. 95–7356. ALLEN *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bailey* v. *United States*, 516 U. S. 137 (1995). Reported below: 56 F. 3d 73.

No. 95–7400. NETTER *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bailey* v. *United States*, 516 U. S. 137 (1995). Reported below: 62 F. 3d 232.

Miscellaneous Orders

No. A–507 (95–8468). COOPER *v.* CONNECTICUT. App. Ct. Conn. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. A–705. KLAT *v.* COUNTY OF SAN DIEGO ET AL. Super. Ct. Cal., County of San Diego. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–1628. IN RE DISBARMENT OF HILLS. Disbarment entered. [For earlier order herein, see 516 U. S. 1038.]

No. D–1634. IN RE DISBARMENT OF WELLS. Edward G. Wells, of Palatine, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on January 22, 1996 [516 U. S. 1090], is discharged.

No. D–1638. IN RE DISBARMENT OF BACHSTEIN. Disbarment entered. [For earlier order herein, see 516 U. S. 1106.]

No. D–1640. In re Disbarment of Benton. Disbarment entered. [For earlier order herein, see 516 U. S. 1106.]

No. D–1641. In re Disbarment of Marcus. Disbarment entered. [For earlier order herein, see 516 U. S. 1107.]

No. D–1644. In re Disbarment of Guth. Disbarment entered. [For earlier order herein, see 516 U. S. 1107.]

No. D–1646. In re Disbarment of Glover. Disbarment entered. [For earlier order herein, see 516 U. S. 1107.]

No. D–1647. In re Disbarment of McCloskey. Disbarment entered. [For earlier order herein, see 516 U. S. 1107.]

No. D–1659. In re Disbarment of Berg. Howard M. Berg, of Boca Raton, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on March 18, 1996 [516 U. S. 1169], is discharged.

No. D–1667. In re Disbarment of Glenn. John Wheeler Glenn, of Baltimore, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1668. In re Disbarment of Kelly. Lawrence Vincent Kelly, of Hasbrouck Heights, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1669. In re Disbarment of Ewing. Charles William Ewing, of Hilliard, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1670. In re Disbarment of Ready. James Sanders Ready, Jr., of Carlsbad, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–52. HARRIS *v.* MONTGOMERY COUNTY DEPARTMENT OF SOCIAL SERVICES;

No. M–53. SCHWARTZ ET AL. *v.* AULTMAN HEALTH SERVICES ASSN., DBA AULTMAN HOSPITAL, ET AL.;

No. M–54. CLIFFORD *v.* GLICKMAN, SECRETARY OF AGRICULTURE; and

No. M–55. CLIFTON *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. M–56. PANDEY *v.* PAUL REVERE LIFE INSURANCE CO. ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 95–346. UNITED STATES *v.* $405,089.23 IN UNITED STATES CURRENCY ET AL. C. A. 9th Cir. [Certiorari granted, 516 U. S. 1070.] Motion of respondent James Wren for leave to proceed further herein *in forma pauperis* granted.

No. 95–7186. JONES *v.* ABC–TV ET AL. C. A. 8th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [516 U. S. 363] denied. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 95–7894. SHIEH *v.* HATHAWAY ET AL. C. A. 9th Cir.; and

No. 95–7895. SHIEH *v.* EBERSHOFF ET AL. C. A. 9th Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until May 6, 1996, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 95–8261. IN RE ZAPATA. Petition for writ of habeas corpus denied.

No. 95–7861. IN RE ROY; and

No. 95–8028. IN RE WARREN. Petitions for writs of mandamus denied.

Certiorari Granted

No. 94–1474. IDAHO ET AL. *v.* COEUR D'ALENE TRIBE OF IDAHO ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 42 F. 3d 1244.

No. 95–789. CALIFORNIA DIVISION OF LABOR STANDARDS ENFORCEMENT ET AL. *v.* DILLINGHAM CONSTRUCTION, N. A., INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 57 F. 3d 712.

No. 95–928. ATHERTON ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR CITY SAVINGS, F. S. B. C. A. 3d Cir. Certiorari granted. Reported below: 57 F. 3d 1231.

No. 95–1263. CATERPILLAR INC. *v.* LEWIS. C. A. 6th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 68 F. 3d 474.

Certiorari Denied

No. 94–35. ALABAMA ET AL. *v.* POARCH BAND OF CREEK INDIANS;

No. 94–189. POARCH BAND OF CREEK INDIANS *v.* ALABAMA ET AL.; and

No. 94–219. FLORIDA ET AL. *v.* SEMINOLE TRIBE OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 1016.

No. 94–1647. COEUR D'ALENE TRIBE OF IDAHO ET AL. *v.* IDAHO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1244.

No. 95–858. CHICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 61 F. 3d 682.

No. 95–878. PRODUCTION PLATED PLASTICS, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 61 F. 3d 904.

No. 95–949. TEAMSTERS LOCAL 115, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied.

No. 95–1003. MONTOYA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 65 F. 3d 405.

No. 95–1049. THO DINH TRAN *v.* DINH TRUONG TRAN ET AL.; and

No. 95–1309. DINH TRUONG TRAN ET AL. *v.* THO DINH TRAN. C. A. 2d Cir. Certiorari denied. Reported below: 54 F. 3d 115.

No. 95–1089. PITTSTON CO. ET AL. *v.* BABBITT, SECRETARY OF THE INTERIOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 66 F. 3d 714.

No. 95–1102. FGS CONSTRUCTORS, INC. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 64 F. 3d 1230.

No. 95–1114. BOGGS *v.* BOWRON ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 67 F. 3d 972.

No. 95–1139. DOSTIE *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 95–1144. DEREWAL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 66 F. 3d 52.

No. 95–1229. KNIGHT, DBA STEVE KNIGHT STEEL FABRICATORS, ET AL. *v.* UNITED STATES FIDELITY & GUARANTY INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 65 F. 3d 34.

No. 95–1245. STEINBERG *v.* BINGHAM, ANCILLARY ADMINISTRATOR OF THE ESTATE OF MARLEY, ET AL.; and
No. 95–1276. ZOLT ET AL. *v.* BINGHAM, ANCILLARY ADMINISTRATOR OF THE ESTATE OF MARLEY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 66 F. 3d 553.

No. 95–1248. NEELY, BY AND THROUGH HER PARENTS, NEELY ET UX. *v.* RUTHERFORD COUNTY SCHOOLS. C. A. 6th Cir. Certiorari denied. Reported below: 68 F. 3d 965.

No. 95–1256. DOLENZ *v.* SOUTHWEST MEDIA CORP. ET AL. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 95–1261. GREEN *v.* UNITED PENTECOSTAL CHURCH INTERNATIONAL. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 899 S. W. 2d 28.

No. 95–1262. FISHBURNE ET AL. *v.* CINERGI PRODUCTIONS, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–1264. CENTRAL CARTAGE CO. *v.* CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 69 F. 3d 1312.

No. 95–1269. WODARSKI *v.* AMERICAN MANUFACTURERS MUTUAL INSURANCE CO. C. A. 10th Cir. Certiorari denied. Reported below: 68 F. 3d 483.

No. 95–1270. SCOTT P., BY AND THROUGH HIS GUARDIANS, BESS P. ET AL. *v.* CARLISLE AREA SCHOOL DISTRICT. C. A. 3d Cir. Certiorari denied. Reported below: 62 F. 3d 520.

No. 95–1271. USA RECYCLING, INC., ET AL. *v.* TOWN OF BABYLON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 66 F. 3d 1272.

No. 95–1277. LITZ *v.* THOMAS. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 95–1279. EINHORN ET AL. *v.* LACHANCE ET AL. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 95–1281. MCCREARY *v.* KENTUCKY. Cir. Ct. Jefferson County, Ky. Certiorari denied.

No. 95–1282. ROBILLARD, ADMINISTRATRIX OF THE ESTATE OF ROBILLARD, DECEASED, ET AL. *v.* BATON ROUGE MARINE CONTRACTORS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 877.

No. 95–1283. JERSEY CARTING, INC., ET AL. *v.* BOARD OF REGULATORY COMMISSIONERS OF NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 95–1285. WILSON *v.* STATE FARM FIRE & CASUALTY INSURANCE CO. C. A. 7th Cir. Certiorari denied.

No. 95–1289. THARP ET AL. *v.* IOWA DEPARTMENT OF CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 68 F. 3d 223.

No. 95–1291. CARTER ET AL. *v.* MROZOWSKI ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 661 A. 2d 44.

No. 95–1292. JACOBS *v.* KERN COMMUNITY COLLEGE DISTRICT. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 95–1295. DAYTON AREA VISUALLY IMPAIRED PERSONS, INC., ET AL. *v.* MONTGOMERY, ATTORNEY GENERAL OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 1474.

No. 95–1303. FLORIDA *v.* RAYFIELD. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 664 So. 2d 6.

No. 95–1304. FLORIDA *v.* JONES. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 662 So. 2d 365.

No. 95–1307. PERRY *v.* LEWTER. Sup. Ct. Ala. Certiorari denied. Reported below: 667 So. 2d 748.

No. 95–1314. CLEMENTS *v.* BABCOCK & WILCOX CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1261.

No. 95–1317. MILLER *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 95–1326. VILLAGE OF LAKE BARRINGTON ET AL. *v.* HOGAN ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 272 Ill. App. 3d 225, 649 N. E. 2d 1366.

No. 95–1331. ORTIZ *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 70 F. 3d 729.

No. 95–1343. SMITH ET UX. *v.* R. S. L. LAYOUT & DESIGN, INC. Sup. Ct. N. H. Certiorari denied.

No. 95–1345. BERGER ET UX. *v.* CITY OF MORGAN HILL, CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 95–1347. PRICE CO. ET AL. *v.* FECHT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1078.

No. 95–1377. HOSPITAL SAN FRANCISCO, INC. *v.* CORREA GONZALEZ ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 69 F. 3d 1184.

No. 95–1379. CARLSON *v.* ICI AMERICAS INC. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 64 F. 3d 327.

No. 95–1382. NEWMAN ET UX. *v.* WORCESTER COUNTY DEPARTMENT OF SOCIAL SERVICES. Ct. App. Ind. Certiorari denied. Reported below: 650 N. E. 2d 726.

No. 95–1391. DUNSTABLE-GROTON CORP., ASSIGNEE OF J & C HOMES, INC. *v.* GROTON PLANNING BOARD. App. Ct. Mass. Certiorari denied. Reported below: 39 Mass. App. 1111, 656 N. E. 2d 589.

No. 95–1394. JIRICKO *v.* LAKIN & HERNDON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 69 F. 3d 539.

No. 95–1396. BROADWATER *v.* CORBETT, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 95–1404. ZIOMEK *v.* CITY AND COUNTY OF SAN FRANCISCO. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 311.

No. 95–1428. FLUEHR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 74 F. 3d 1228.

No. 95–1446. CURTIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 113.

No. 95–1447. JONES ET AL. *v.* CHEMETRON CORP. C. A. 3d Cir. Certiorari denied. Reported below: 72 F. 3d 341.

No. 95–1453. PUDLO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 272 Ill. App. 3d 1002, 651 N. E. 2d 676.

No. 95–1454. HERNANDEZ-VARGAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 62 F. 3d 1429.

No. 95–1458. CELESTIAL CHURCH OF CHRIST, INC. *v.* CITY OF CHICAGO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 269 Ill. App. 3d 1113, 685 N. E. 2d 446.

No. 95–1481. CHAPA *v.* JIM WELLS COUNTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 875.

No. 95–1485. BERTOLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 74 F. 3d 1228.

No. 95–1504. MARCINEK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 135.

No. 95–6845. BELLRICHARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 62 F. 3d 1046.

No. 95–6966. SIMON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 56 F. 3d 75.

No. 95–6988. NOBLES *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 676.

No. 95–6993. IBALIO *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 60 F. 3d 841.

No. 95–6996. QUIBA *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1433.

No. 95–6997. SIWA *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1433.

No. 95–7004. MAURICIO *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 60 F. 3d 841.

No. 95–7007. DE JESUS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1431.

No. 95–7008. DAGUINOTNOT *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1431.

No. 95–7009. FILAMOR *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 60 F. 3d 841.

No. 95–7010. DUNGCA *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 60 F. 3d 841.

No. 95–7012. DIEGUEZ-ALVAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 69 F. 3d 550 and 551.

No. 95–7014. PANTILON *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1432.

No. 95–7041. Carpio *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 672.

No. 95–7042. Cayanan *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1432.

No. 95–7043. Alferos *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 60 F. 3d 841.

No. 95–7044. Corpuz *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 677.

No. 95–7045. Bondad *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1432.

No. 95–7046. Calisaan *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1432.

No. 95–7054. Jackson *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 59 F. 3d 1421.

No. 95–7066. Rabe *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 60 F. 3d 842.

No. 95–7081. Cabiles *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1432.

No. 95–7088. Danao *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 672.

No. 95–7089. Florentino *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 672.

No. 95–7134. Hardy et ux. *v.* City of Orlando. C. A. 11th Cir. Certiorari denied. Reported below: 62 F. 3d 400.

No. 95–7145. Isla *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 676.

No. 95–7147. NAVARRO *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 60 F. 3d 842.

No. 95–7153. CAMPBELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 910 S. W. 2d 475.

No. 95–7182. MAGANTE *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1431.

No. 95–7231. CUSTODIO *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 60 F. 3d 841.

No. 95–7257. ALCONES *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 60 F. 3d 842.

No. 95–7263. MAGLALANG *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 672.

No. 95–7320. TAYLOR *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 166 Ill. 2d 414, 655 N. E. 2d 901.

No. 95–7321. DELA REA *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 60 F. 3d 841.

No. 95–7330. GRANT-CHASE *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 140 N. H. 264, 665 A. 2d 380.

No. 95–7366. OWENS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 95–7389. CORONEL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1432.

No. 95–7442. PALO *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 60 F. 3d 842.

No. 95–7450. MAYO *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1431.

No. 95–7463. TILLO *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 60 F. 3d 842.

No. 95–7483. SANCHEZ *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1432.

No. 95–7485. SANTOS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 61 F. 3d 919.

No. 95–7491. DELOS REYES *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 66 F. 3d 347.

No. 95–7511. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 67 F. 3d 1154.

No. 95–7517. SULTAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 95–7641. REYES *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1431.

No. 95–7725. FORONDA *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 672.

No. 95–7726. GARCIA *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1431.

No. 95–7751. BERGMANN *v.* MCCOLLOUGH. Ct. App. Ga. Certiorari denied. Reported below: 218 Ga. App. 353, 461 S. E. 2d 544.

No. 95–7758. HAI CONG PHAM *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 95–7769. SMITH *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 95–7790. BAIJNATH *v.* CHAN, SENIOR MINISTER OF TRADE FOR IMPORT AND EXPORT, GEORGETOWN, GUYANA, SOUTH AMERICA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 60 F. 3d 813.

No. 95–7798. NUNEZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 95–7800. BERNARDEZ *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 68 F. 3d 488.

No. 95–7802. CLUCK *v.* OSHEROW, TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 876.

No. 95–7804. TARABOLSKI *v.* TOWN OF SHARON, MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 70 F. 3d 110.

No. 95–7810. DYKES *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 68 F. 3d 1564.

No. 95–7814. HILL *v.* KING, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 66 F. 3d 340.

No. 95–7816. ESCUSA *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1431.

No. 95–7817. GRAVES *v.* BURRELL, JUDGE, JUSTICE COURT OF SUNFLOWER COUNTY. Sup. Ct. Miss. Certiorari denied.

No. 95–7819. DUBUC *v.* HOPPER, JUDGE, TULSA COUNTY. Ct. Crim. App. Okla. Certiorari denied.

No. 95–7820. GIBSON *v.* JONES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–7822. ANDREWS *v.* GEORGIA STATE BOARD OF PARDONS AND PAROLES ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–7823. BILLUPS *v.* SCHOTTEN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 67 F. 3d 299.

No. 95–7824. BANKS *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–7827. BILLBERRY *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 47, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 57 F. 3d 1076.

No. 95–7833. Alvarez *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 68 F. 3d 1242.

No. 95–7835. Contreras *v.* Stainer et al. C. A. 9th Cir. Certiorari denied.

No. 95–7838. Webb *v.* Fields, Director, Oklahoma Department of Corrections, et al. Sup. Ct. Okla. Certiorari denied. Reported below: 907 P. 2d 1055.

No. 95–7839. Bernard *v.* Office of the Queens County District Attorney. C. A. 2d Cir. Certiorari denied.

No. 95–7842. Gilkey *v.* Hill et al. Ct. App. Kan. Certiorari denied.

No. 95–7850. Nelson *v.* Cannon et al. C. A. 4th Cir. Certiorari denied. Reported below: 72 F. 3d 127.

No. 95–7851. Nooner *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 322 Ark. 87, 907 S. W. 2d 677.

No. 95–7852. Lynch *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 340 N. C. 435, 459 S. E. 2d 679.

No. 95–7853. Karageorgos *v.* Beach, Cadigan & Martin et al. Ct. Sp. App. Md. Certiorari denied. Reported below: 103 Md. App. 777.

No. 95–7857. James *v.* State Bar of California. Sup. Ct. Cal. Certiorari denied.

No. 95–7868. Burley *v.* McDonnell Douglas Helicopter Co. C. A. 9th Cir. Certiorari denied.

No. 95–7871. Cupit *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 95–7873. Terry *v.* Huffman, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 1234.

No. 95–7875. Jones *v.* Gomez, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 66 F. 3d 199.

No. 95–7878. Stephens *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 95–7880. Braun *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 909 P. 2d 783.

No. 95–7882. White *v.* New York State Workers' Compensation Board. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 95–7885. Estes *v.* Namba et al. C. A. 10th Cir. Certiorari denied. Reported below: 74 F. 3d 1249.

No. 95–7887. Free *v.* United States Court of Appeals for the Ninth Circuit. C. A. 9th Cir. Certiorari denied.

No. 95–7893. Soler-Somahano *v.* Immigration and Naturalization Service. C. A. 11th Cir. Certiorari denied. Reported below: 67 F. 3d 313.

No. 95–7896. Belyeu *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 67 F. 3d 535.

No. 95–7899. Powell *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 906 P. 2d 765.

No. 95–7905. Davenport *v.* Meloy, Superintendent, Rockville Training Center. C. A. 7th Cir. Certiorari denied.

No. 95–7910. Digby *v.* Followill, Judge, Superior Court of Georgia, Chattahoochee County, et al. C. A. 11th Cir. Certiorari denied.

No. 95–7915. Scott *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 95–7917. Bryson *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 903 P. 2d 333.

No. 95–7918. Cavanaugh *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 95–7920. Anderson *v.* Newberry, Warden. C. A. 6th Cir. Certiorari denied.

No. 95–7928. Kiliona *v.* Hawaii et al. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 120.

No. 95–7941. Bennett *v.* United States; and
No. 95–8271. Houser *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 87.

No. 95–7963. Rauser *v.* Beard, Deputy Commissioner, Pennsylvania Department of Corrections, et al. C. A. 3d Cir. Certiorari denied.

No. 95–7980. Abdelmeged *v.* B–G Maintenance Management of Colorado, Inc. C. A. 10th Cir. Certiorari denied. Reported below: 61 F. 3d 915.

No. 95–7984. Sledge *v.* Cummings et al. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 548.

No. 95–7993. Hooks *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 902 P. 2d 1120.

No. 95–8044. Ramer *v.* Thomas, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 61 F. 3d 916.

No. 95–8058. McQueen *v.* Hayes et al. C. A. 5th Cir. Certiorari denied.

No. 95–8064. Aguilar *v.* Newton, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 547.

No. 95–8065. Aguilar *v.* New Mexico. Dist. Ct. N. M., Bernalillo County. Certiorari denied.

No. 95–8071. Hoxsie *v.* Kerby, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 70 F. 3d 1282.

No. 95–8083. Sewell et al. *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 273 Ill. App. 3d 519, 652 N. E. 2d 1146.

No. 95–8086. Alexander *v.* Mississippi et al. Sup. Ct. Miss. Certiorari denied. Reported below: 667 So. 2d 1.

No. 95–8087. Harvey *v.* Bowersox, Superintendent, Potosi Correctional Center, et al. C. A. 8th Cir. Certiorari denied.

No. 95–8088. Harvey *v.* "United States Marshal Edmo" et al. C. A. 8th Cir. Certiorari denied.

No. 95–8089. HARVEY *v.* SCHRIRO, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 95–8093. NELSON *v.* HOPKINS. C. A. 4th Cir. Certiorari denied. Reported below: 76 F. 3d 374.

No. 95–8107. SQUARE *v.* MORTON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 95–8110. STEEVES *v.* ALLEN, COMMISSIONER, MAINE DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 72 F. 3d 121.

No. 95–8136. THARPE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 71 F. 3d 881.

No. 95–8142. PILOTO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 67 F. 3d 298.

No. 95–8154. TINSLEY *v.* METHODIST HOSPITAL OF INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 70 F. 3d 1275.

No. 95–8157. CHRISTY *v.* COOPER, ASSISTANT ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 66 F. 3d 341.

No. 95–8161. MILLER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 95–8168. DELBRIDGE ET UX. *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES ET AL. C. A. 3d Cir. Certiorari denied.

No. 95–8181. BIGGS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 95–8182. WONDERLY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 70 F. 3d 1020.

No. 95–8183. PETTEE *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 538 N. W. 2d 126.

No. 95–8188. WALDEN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 183 Ariz. 595, 905 P. 2d 974.

No. 95–8193. STANDING BEAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 68 F. 3d 271.

No. 95–8195. CLARK *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 386.

No. 95–8200. GARNER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 74 Ohio St. 3d 49, 656 N. E. 2d 623.

No. 95–8201. HUREL GUERRERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 99 F. 3d 400.

No. 95–8203. FARMER *v.* HAWK ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–8206. CAMPBELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 70 F. 3d 1323.

No. 95–8207. COFFIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 76 F. 3d 494.

No. 95–8208. BARBOUR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 580.

No. 95–8210. SANDERS ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 68 F. 3d 483.

No. 95–8212. ASHLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 135.

No. 95–8220. HELMSTETTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 F. 3d 1189.

No. 95–8222. GOODMAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 95–8225. CARRAZANA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 70 F. 3d 1339.

No. 95–8229. MILLER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 70 F. 3d 1353.

No. 95–8231. MACARMOUR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 136.

No. 95–8234. JACKSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 95–8235. Martinez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 999.

No. 95–8238. Broach *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 74 F. 3d 1238.

No. 95–8241. Broumas *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 69 F. 3d 1178.

No. 95–8244. Casas *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 72 F. 3d 124.

No. 95–8245. Cannon *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 113.

No. 95–8246. Vallejo *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 992.

No. 95–8253. Smith et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 77 F. 3d 472.

No. 95–8262. Williams *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 78 F. 3d 580.

No. 95–8264. Liggins *v.* Ohio Department of Development et al. C. A. 6th Cir. Certiorari denied. Reported below: 68 F. 3d 474.

No. 95–8265. Morgan *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 70 F. 3d 1258.

No. 95–8266. McClelland *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 717.

No. 95–8267. McWilliams *v.* Colorado. Ct. App. Colo. Certiorari denied.

No. 95–8269. Morrison *v.* Reno, Attorney General of the United States, et al. C. A. 8th Cir. Certiorari denied.

No. 95–8270. Guzman *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 68 F. 3d 49.

No. 95–8272. Suggs *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 473.

No. 95–8280. Sanders *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 1268.

No. 95–8286. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 76 F. 3d 376.

No. 95–8287. SHERRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 73 F. 3d 365.

No. 95–8288. ROMERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 54 F. 3d 56.

No. 95–8291. WRIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 66 F. 3d 1146.

No. 95–8292. TAYLOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 70 F. 3d 1257.

No. 95–8295. DARDEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 70 F. 3d 1507.

No. 95–8296. DILBERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 71 F. 3d 882.

No. 95–8300. DOYLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 78 F. 3d 579.

No. 95–8301. HAWKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 74 F. 3d 1228.

No. 95–8304. HUNTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 74 F. 3d 1228.

No. 95–8312. MYLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 477.

No. 95–8318. STRYDOM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 371.

No. 95–8325. CLAYPOOL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 464.

No. 95–8330. MCCAULEY *v.* WINEGARDEN, JUDGE, SUPERIOR COURT OF GEORGIA, GWINNETT COUNTY, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 60 F. 3d 766.

No. 95–8333. ROBINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 371.

No. 95–8339. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 67 F. 3d 297.

No. 95–8343. CONTI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 73 F. 3d 361.

No. 95–961. MCDANIEL, WARDEN, ET AL. *v.* MCKENNA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 65 F. 3d 1483.

No. 95–1265. FLORIDA *v.* JONES. Dist. Ct. App. Fla., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 656 So. 2d 489.

No. 95–1305. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION *v.* REED. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 70 F. 3d 844.

No. 95–1098. CASELLA *v.* EQUIFAX CREDIT INFORMATION SERVICES ET AL. C. A. 2d Cir. Motion of National Association of Consumer Advocates et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 56 F. 3d 469.

No. 95–1223. A. A. & M. CARTING SERVICE, INC., ET AL. *v.* TOWN OF BABYLON ET AL. C. A. 2d Cir. Motion of New York State Conference of Mayors and Municipal Officers for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 66 F. 3d 1272.

No. 95–1224. BROIDA *v.* HOROWITZ ET AL. C. A. 11th Cir. Motion of petitioner to strike the brief in opposition denied. Certiorari denied. Reported below: 53 F. 3d 1285.

No. 95–7864. SAUNDERS *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 66 F. 3d 312.

Rehearing Denied

No. 95–782. SSC CORP. *v.* TOWN OF SMITHTOWN ET AL., 516 U. S. 1112;

No. 95–826. JENKINS *v.* NEW MEXICO SECURITIES DIVISION, 516 U. S. 1074;

No. 95–843. BUSH *v.* JONES ET AL., 516 U. S. 1113;

No. 95–914. BROIDA *v.* SMITH, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HOROWITZ, DECEASED, ET AL., 516 U. S. 1141;

No. 95–1005. MORATA *v.* UNITED STATES POSTAL SERVICE, 516 U. S. 1117;

No. 95–1066. SIMONE ET UX. *v.* WORCESTER COUNTY INSTITUTION FOR SAVINGS, 516 U. S. 1159;

No. 95–1091. ANDERSON *v.* UNITED STATES, 516 U. S. 1119;

No. 95–1120. BOLT *v.* SINGLETON ET AL., 516 U. S. 1147;

No. 95–1149. BRAKE *v.* DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, 516 U. S. 1147;

No. 95–6851. STANO *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 516 U. S. 1122;

No. 95–7024. MCCORMICK *v.* KAYLO, WARDEN, 516 U. S. 1124;

No. 95–7033. FROMAL *v.* JACKSON, 516 U. S. 1124;

No. 95–7037. VERDUGO *v.* CALIFORNIA STATE UNIVERSITY AT LOS ANGELES ET AL., 516 U. S. 1124;

No. 95–7047. YOUNG *v.* CITY OF CULVER CITY, CALIFORNIA, ET AL., 516 U. S. 1124;

No. 95–7055. MENDOZA-FIGUEROA *v.* UNITED STATES, 516 U. S. 1125;

No. 95–7065. CROWE *v.* GEORGIA, 516 U. S. 1148;

No. 95–7096. WYNN *v.* AC ROCHESTER, DIVISION OF GENERAL MOTORS CORP., 516 U. S. 1125;

No. 95–7101. MARIAN *v.* CALLES ET AL., 516 U. S. 1126;

No. 95–7102. LAW *v.* LAW, 516 U. S. 1126;

No. 95–7121. ARVIN-THORNTON *v.* PHILIP MORRIS PRODUCTS, INC., 516 U. S. 1126;

No. 95–7144. MELKONIAN ET AL. *v.* TRUCK INSURANCE EXCHANGE ET AL., 516 U. S. 1127;

No. 95–7187. KNIGHT *v.* COURT OF CIVIL APPEALS OF ALABAMA, 516 U. S. 1129;

No. 95–7192. SWEENEY *v.* UNITED STATES, 516 U. S. 1129;

No. 95–7210. ORNELAS *v.* MYERS, WARDEN, ET AL., 516 U. S. 1129;

No. 95–7271. GALLEGO-SANCHEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE, 516 U. S. 1132;

No. 95–7287. FELKER *v.* THOMAS, WARDEN, 516 U. S. 1133;

No. 95–7298. TOKHTAMESHEV *v.* AMERICAN NATIONAL CAN CO., 516 U. S. 1149;

No. 95–7365. IN RE MCQUEEN, 516 U. S. 1157;

No. 95–7380. PRINGLE *v.* UNITED STATES, 516 U. S. 1135;
No. 95–7388. IN RE MARTINEZ, 516 U. S. 1145;
No. 95–7402. NANCE *v.* UNITED STATES, 516 U. S. 1136;
No. 95–7470. EICKLEBERRY *v.* UNITED STATES, 516 U. S. 1138;
No. 95–7489. TYLER *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 516 U. S. 1149;
No. 95–7567. ENGELKING *v.* UNITED STATES, 516 U. S. 1150;
No. 95–7611. WARD *v.* TURNER, 516 U. S. 1151;
No. 95–7624. CURIALE *v.* SEDWICK, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, 516 U. S. 1163;
No. 95–7631. DREAD *v.* MARYLAND STATE POLICE, 516 U. S. 1163;
No. 95–7788. IN RE ROBINSON, 516 U. S. 1157; and
No. 95–7813. FLEMMINGS *v.* MORTON ET AL., 516 U. S. 1166. Petitions for rehearing denied.

No. 95–6504. UZOWURU *v.* WILLIAMS BROTHERS CONSTRUCTION CO., INC., ET AL., 516 U. S. 1053. Motion for leave to file petition for rehearing denied.

APRIL 17, 1996

Dismissal Under Rule 46

No. 95–1176. PALMER COMMUNICATIONS, INC., ET AL. *v.* TOTAL TV. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 69 F. 3d 298.

APRIL 22, 1996

Certiorari Granted—Vacated and Remanded

No. 95–642. FRIEND *v.* UNITED STATES. C. A. 8th Cir. Petition for rehearing granted, and the order entered January 22, 1996 [516 U. S. 1093], denying the petition for writ of certiorari is vacated. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bailey* v. *United States*, 516 U. S. 137 (1995). Reported below: 50 F. 3d 548.

Miscellaneous Orders

No. A–796. ELIAS *v.* UNITED STATES. Application for release pending appeal, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–835. AYERS ET AL. *v.* FORDICE, GOVERNOR OF MISSISSIPPI, ET AL. Application for stay of order of the United States District Court for the Northern District of Mississippi, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. A–843 (95–1649). KANSAS *v.* HENDRICKS. Sup. Ct. Kan. Application for stay, presented to JUSTICE BREYER, and by him referred to the Court, granted, and it is ordered that the mandate of the Supreme Court of Kansas, case No. 73,039, is stayed pending this Court's action of the petition for writ of certiorari. Should the petition for writ of certiorari be granted, this order is to continue in effect pending the issuance of the mandate of this Court. If the petition for writ of certiorari is denied, this order is to terminate automatically.

No. D–1671. IN RE DISBARMENT OF WALL. Kevin F. Wall, of Oaklyn, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1672. IN RE DISBARMENT OF JENNINGS. Kathleen Perry Jennings, of Greenville, S. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1673. IN RE DISBARMENT OF POLLACK. Sanford E. Pollack, of Baldwin, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1675. IN RE DISBARMENT OF PINCHAM. Robert Eugene Pincham, Jr., of Chicago, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 95–137. WILLIAMS ET AL. *v.* NATIONAL BASKETBALL ASSN. ET AL. C. A. 2d Cir. Motion of respondents to defer consideration of petition for writ of certiorari denied.

No. 95–345. UNITED STATES *v.* URSERY. C. A. 6th Cir. [Certiorari granted, 516 U. S. 1070]; and

No. 95–346. United States *v.* $405,089.23 in United States Currency et al. C. A. 9th Cir. [Certiorari granted, 516 U. S. 1070.] Motion of National Association of Criminal Defense Lawyers for leave to file a brief as *amicus curiae* granted.

No. 95–860. Smiley *v.* Citibank (South Dakota), N. A. Sup. Ct. Cal. [Certiorari granted, 516 U. S. 1087.] Motion of the Attorney General of Indiana to withdraw as *amicus curiae* granted.

No. 95–891. Ohio *v.* Robinette. Sup. Ct. Ohio. [Certiorari granted, 516 U. S. 1157.] Motion of Americans for Effective Law Enforcement for leave to file a brief as *amicus curiae* granted.

No. 95–939. Immigration and Naturalization Service *v.* Elramly. C. A. 9th Cir. [Certiorari granted, 516 U. S. 1170.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 95–1455. Reno, Attorney General *v.* Bossier Parish School Board et al. Appeal from D. C. D. C. Motion of appellee to supplement the record denied.

No. 95–8345. In re Haney. Petition for writ of mandamus denied.

Certiorari Granted

No. 95–1100. Board of the County Commissioners of Bryan County, Oklahoma *v.* Brown et al. C. A. 5th Cir. Certiorari granted. Reported below: 67 F. 3d 1174.

No. 95–1228. United States *v.* Wells et al. C. A. 8th Cir. Certiorari granted. Reported below: 63 F. 3d 745.

No. 95–1376. Robinson *v.* Shell Oil Co. C. A. 4th Cir. Certiorari granted. Reported below: 70 F. 3d 325.

Certiorari Denied

No. 95–803. Black *v.* United States et al. C. A. 8th Cir. Certiorari denied. Reported below: 62 F. 3d 1115.

No. 95–958. Nelson *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 48 F. 3d 1238.

No. 95-959. 640 Broadway Renaissance Co. *v.* Eisner et al. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 212 App. Div. 2d 376, 622 N. Y. S. 2d 262.

No. 95-1134. Rodriguez de Castro *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 63 F. 3d 148.

No. 95-1143. Oregon Public Utility Commission *v.* GTE Northwest Inc. Sup. Ct. Ore. Certiorari denied. Reported below: 321 Ore. 458, 900 P. 2d 495.

No. 95-1146. Clark et al. *v.* Clarkstown Central School District et al. C. A. 2d Cir. Certiorari denied. Reported below: 71 F. 3d 405.

No. 95-1150. J. A. Croson Co. *v.* Central Ohio Joint Vocational School District et al. Ct. App. Ohio, Madison County. Certiorari denied. Reported below: 104 Ohio App. 3d 146, 661 N. E. 2d 250.

No. 95-1156. London *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 66 F. 3d 1227.

No. 95-1173. Hamlet *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 63 F. 3d 1097.

No. 95-1182. St. Peter Villa, Inc., et al. *v.* Linton, by her next friend, Arnold, et al. C. A. 6th Cir. Certiorari denied. Reported below: 65 F. 3d 508.

No. 95-1191. Trahan *v.* Trahan. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 894 S. W. 2d 113.

No. 95-1195. Whitmore et al. *v.* Federal Election Commission et al. C. A. 9th Cir. Certiorari denied. Reported below: 68 F. 3d 1212.

No. 95-1197. National Association of Broadcasters et al. *v.* Miller et al.;
No. 95-1200. Federal Communications Commission et al. *v.* Miller et al.; and
No. 95-1361. Miller et al. *v.* Federal Communications Commission et al. C. A. 11th Cir. Certiorari denied. Reported below: 66 F. 3d 1140.

No. 95–1255. SHELSTAD ET AL. *v.* WEST ONE BANK (IDAHO), FKA IDAHO FIRST NATIONAL BANK, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 59 F. 3d 176.

No. 95–1280. BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT *v.* ABBOTT AMBULANCE, INC. C. A. 8th Cir. Certiorari denied. Reported below: 70 F. 3d 118.

No. 95–1294. SAWATZKY *v.* OKLAHOMA CITY. Ct. Crim. App. Okla. Certiorari denied. Reported below: 906 P. 2d 785.

No. 95–1298. ABELES *v.* INFOTECHNOLOGY, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 89 F. 3d 825.

No. 95–1299. "BOB" *v.* "MARY" ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 273 Mont. 351, 903 P. 2d 207.

No. 95–1313. CAFE 207, INC. *v.* ST. JOHNS COUNTY. C. A. 11th Cir. Certiorari denied. Reported below: 66 F. 3d 272.

No. 95–1316. SOLVENTES Y QUIMICA DE NICARAGUA, S. A. SOLQUIMISA, ET AL. *v.* WEAVER, LIQUIDATING TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 878.

No. 95–1320. BROWN ET AL. *v.* PASKVAN. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 1272.

No. 95–1322. CREHAN ET UX. *v.* DEBOER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 64 F. 3d 1171.

No. 95–1327. IN RE CARGILL, INC. C. A. 1st Cir. Certiorari denied. Reported below: 66 F. 3d 1256.

No. 95–1334. GRIGGS ET VIR *v.* SOUTH CAROLINA ELECTRIC & GAS CO. Sup. Ct. S. C. Certiorari denied. Reported below: 320 S. C. 127, 463 S. E. 2d 608.

No. 95–1342. FRED MEYER, INC. *v.* CASEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 1412.

No. 95–1346. VASQUEZ ET VIR *v.* HERNANDEZ ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 60 F. 3d 325.

No. 95–1350. CHEROKEE INSURANCE CO., BY AND THROUGH WEED, SPECIAL DEPUTY COMMISSIONER OF COMMERCE AND INSURANCE FOR THE REHABILITATION OF CHEROKEE INSURANCE

Co. *v.* E. W. Blanch Co. et al. C. A. 6th Cir. Certiorari denied. Reported below: 66 F. 3d 117.

No. 95–1399. Eades et ux. *v.* Clark Distributing Co., Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 441.

No. 95–1421. Jensen *v.* County of Santa Clara, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 544.

No. 95–1442. Huang *v.* French et al. C. A. 4th Cir. Certiorari denied. Reported below: 73 F. 3d 357.

No. 95–1466. Plott *v.* General Motors Corp., Packard Electric Division. C. A. 6th Cir. Certiorari denied. Reported below: 71 F. 3d 1190.

No. 95–1476. Jackson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 1370.

No. 95–1499. Daley et al. *v.* Rambo. C. A. 7th Cir. Certiorari denied. Reported below: 68 F. 3d 203.

No. 95–1553. Flinn *v.* Florida Bar et al. C. A. 11th Cir. Certiorari denied. Reported below: 62 F. 3d 400.

No. 95–1562. Williams *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 59 F. 3d 1180.

No. 95–1564. Kimbrough *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 69 F. 3d 723.

No. 95–6984. Triestman *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 60 F. 3d 812.

No. 95–7178. Buyea *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 66 F. 3d 336.

No. 95–7190. Jordan *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 66 F. 3d 317.

No. 95–7198. Graham *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 541 Pa. 173, 661 A. 2d 1367.

No. 95–7279. Beets *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 65 F. 3d 1258.

No. 95–7433. COOPER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 63 F. 3d 761.

No. 95–7525. TEAGUE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 67 F. 3d 1208.

No. 95–7540. JERVIS, AKA HARRISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 62 F. 3d 1426.

No. 95–7546. RUTH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 65 F. 3d 599.

No. 95–7560. TERRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 72 F. 3d 125.

No. 95–7583. EDWARDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 70 F. 3d 1274.

No. 95–7598. NICHOLAS *v.* RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 95–7616. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 64 F. 3d 1105.

No. 95–7812. DUCKETT *v.* GODINEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 734.

No. 95–7933. J. A. L. *v.* HAMPTON ET AL. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 658 So. 2d 331.

No. 95–7937. SHORES *v.* FOSTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 69 F. 3d 533.

No. 95–7938. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 73 F. 3d 1107.

No. 95–7940. ROBINSON *v.* MELOY, SUPERINTENDENT, ROCKVILLE TRAINING CENTER. C. A. 7th Cir. Certiorari denied.

No. 95–7944. SEVIGNY ET VIR *v.* MAINE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 69 F. 3d 531.

No. 95–7947. OLSEN *v.* LANE ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 666 So. 2d 906.

No. 95–7953. BARNO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 95–7956. YATES *v.* GODWIN. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 1266.

No. 95–7958. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–7964. SIQUEROS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 11 Cal. 4th 568, 904 P. 2d 1197.

No. 95–7969. JOHNSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 660 So. 2d 637.

No. 95–7970. JOHNSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 660 So. 2d 648.

No. 95–7976. JAE *v.* GOOD. C. A. 3d Cir. Certiorari denied. Reported below: 65 F. 3d 162.

No. 95–7977. MCREYNOLDS *v.* PATAKI, GOVERNOR OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 87 N. Y. 2d 860, 662 N. E. 2d 793.

No. 95–7983. SMITH *v.* HERRING, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–7990. WRIGHT *v.* BROWN, SUPERINTENDENT, CLALLAM BAY CORRECTIONS CENTER, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 311.

No. 95–7991. ZANKICH *v.* ALLEN, CLERK, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–7998. CORTEZ ESCAMILLA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–8001. RIVENS *v.* DUNN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 76 F. 3d 375.

No. 95–8008. PARKS *v.* ALLSTATE INSURANCE CO. Ct. App. Ga. Certiorari denied.

No. 95–8009. MANGRUM *v.* SIMMONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–8013. CAMPISI *v.* MAFFEO, TRUSTEE OF THE JOHN CAPOBIANCO TRUST, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 66 F. 3d 306.

No. 95–8014. KOFFIEL *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 62 F. 3d 400.

No. 95–8015. KENNEDY *v.* COURT OF APPEALS OF MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 95–8024. BERGMANN *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 65 F. 3d 1372.

No. 95–8025. TAYLOR *v.* COBB ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–8053. NOTHEIS *v.* PETKOVICH. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 908 S. W. 2d 803.

No. 95–8061. COLEMAN *v.* NEW YORK COMMISSION OF CORRECTION ET AL.; COLEMAN *v.* MURRAY ET AL.; and COLEMAN *v.* NEW YORK COMMISSION OF CORRECTION ET AL. C. A. 2d Cir. Certiorari denied.

No. 95–8062. BARBEE *v.* STATE FARM AUTOMOBILE INSURANCE CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 66 F. 3d 310.

No. 95–8072. HUGHEY *v.* COLUMBIA COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 74 F. 3d 1243.

No. 95–8079. WALP *v.* GOODWIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 66 F. 3d 323.

No. 95–8096. RIOS *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied.

No. 95–8102. CSORBA *v.* ITT ELECTRO-OPTICAL PRODUCTS DIVISION. C. A. 4th Cir. Certiorari denied. Reported below: 73 F. 3d 356.

No. 95–8141. WOODBURY *v.* SEARS, ROEBUCK & CO. C. A. 11th Cir. Certiorari denied.

No. 95–8156. BUIVIDAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 95–8205. RISE ET AL. *v.* OREGON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 59 F. 3d 1556.

No. 95–8211. SHAFII *v.* BRITISH AIRWAYS. C. A. 2d Cir. Certiorari denied. Reported below: 71 F. 3d 404.

No. 95–8237. OKOLIE ET AL. *v.* RICHARDSON, COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied.

No. 95–8242. CRABTREE *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–8274. BYNUM *v.* STATE FARM INSURANCE CO. Ct. App. Ga. Certiorari denied. Reported below: 219 Ga. App. XXVI.

No. 95–8277. SNEEDEN *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 76 F. 3d 375.

No. 95–8310. MAYBECK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 76 F. 3d 376.

No. 95–8313. MILLER *v.* OREGON STATE PRISON. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 369.

No. 95–8321. HARDY *v.* PINKERTON SECURITY SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 59 F. 3d 1241.

No. 95–8326. CAMILO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 71 F. 3d 984.

No. 95–8328. JOYCE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 70 F. 3d 679.

No. 95–8331. KELLOTAT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 309.

No. 95–8347. MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 62 F. 3d 1009.

No. 95–8348. CAMPBELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 61 F. 3d 976.

No. 95–8350. TOBISCH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 69 F. 3d 540.

No. 95–8355. HODGES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 73 F. 3d 364.

No. 95–8357. HAND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 76 F. 3d 393.

No. 95–8366. ROBERTSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 74 F. 3d 1247.

No. 95–8367. PEDRAZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 73 F. 3d 374.

No. 95–8369. COX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 72 F. 3d 138.

No. 95–8370. CAMP ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 759.

No. 95–8371. BENNETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 113.

No. 95–8372. COLEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 52 F. 3d 326.

No. 95–8378. ALVAREZ-FIGUEROA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 370.

No. 95–8380. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 74 F. 3d 676.

No. 95–8381. YILDIRIM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 73 F. 3d 363.

No. 95–8389. ANDERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 72 F. 3d 563.

No. 95–8395. HYPPOLITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 65 F. 3d 1151.

No. 95–8398. FORTY-ESTREMERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 67 F. 3d 1002.

No. 95–8399. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 73 F. 3d 1108.

No. 95–8400. DANOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 476.

No. 95–8401. FOX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 73 F. 3d 359.

No. 95–8403. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 78 F. 3d 581.

No. 95–8404. KENDRICKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 73 F. 3d 1108.

No. 95–8405. KUSSAIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 371.

No. 95–1159. NANSAY HAWAII, INC. *v.* PUBLIC ACCESS SHORELINE HAWAII. Sup. Ct. Haw. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 79 Haw. 425, 903 P. 2d 1246.

No. 95–1315. METROPOLITAN EDISON CO. ET AL. *v.* DODSON ET AL. C. A. 3d Cir. Motion of Nuclear Energy Institute et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this motion and this petition. Reported below: 67 F. 3d 1119.

Rehearing Granted. (See No. 95–642, *supra*, at 1152.)

Rehearing Denied

No. 94–8729. BENNIS *v.* MICHIGAN, 516 U. S. 442;

No. 95–880. TATUM ET AL. *v.* COLUMBIA NATURAL RESOURCES, INC., ET AL., 516 U. S. 1158;

No. 95–6905. ESPARZA *v.* ELLIOTT, WARDEN, ET AL., 516 U. S. 1122;

No. 95–7280. SIKORA *v.* DOE ET AL., 516 U. S. 1148;

No. 95–7376. HAMAN *v.* KING ET AL., 516 U. S. 1162;

No. 95–7419. NASIM *v.* WARDEN, MARYLAND HOUSE OF CORRECTION, ET AL., 516 U. S. 1177;

No. 95–7429. BOWLES *v.* MINNESOTA, 516 U. S. 1162;

No. 95–7642. SIMPSON *v.* CRISTINO RIVERA MINING CO. ET AL., *ante*, p. 1109;

No. 95–7719. WRIGHT, AKA DENVERS *v.* UNITED STATES, 516 U. S. 1164; and

No. 95–7776. IN RE KENNEDY, 516 U. S. 1157. Petitions for rehearing denied.

April 23, 1996

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post,* p. 1257; amendments to the Federal Rules of Bankruptcy Procedure, see *post,* p. 1265; amendments to the Federal Rules of Civil Procedure, see *post,* p. 1281; and amendments to the Federal Rules of Criminal Procedure, see *post,* p. 1287.)

April 25, 1996

Certiorari Denied

No. 95–8717 (A–873). Brewer *v.* Ward, Warden. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to Justice Breyer, and by him referred to the Court, denied. Certiorari denied. Reported below: 83 F. 3d 431.

April 26, 1996

Dismissal Under Rule 46

No. 95–1430. Rogers et al. *v.* Desiderio et al. App. Ct. Ill., 3d Dist. Certiorari dismissed under this Court's Rule 46.1. Reported below: 274 Ill. App. 3d 446, 655 N. E. 2d 930.

April 29, 1996

Dismissal Under Rule 46

No. 94–2016. Independent Life & Accident Insurance Co. *v.* Harrington, as Administratrix of the Estate of Casey, Deceased. Sup. Ct. Ala. Certiorari dismissed under this Court's Rule 46. Reported below: 658 So. 2d 892.

Certiorari Granted—Vacated and Remanded

No. 94–2081. United States Surgical Corp. *v.* Ethicon, Inc., et al. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Markman* v. *Westview Instruments, Inc., ante,* p. 370. Justice Breyer took no part in the consideration or decision of this case. Reported below: 48 F. 3d 1237.

No. 95–7711. Rhodes *v.* United States. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bailey* v. *United States*, 516 U. S. 137 (1995). Reported below: 62 F. 3d 1449.

Miscellaneous Orders

No. D–1613. In re Disbarment of Jones. Disbarment entered. [For earlier order herein, see 516 U. S. 985.]

No. D–1645. In re Disbarment of Schouman. Disbarment entered. [For earlier order herein, see 516 U. S. 1107.]

No. D–1648. In re Disbarment of Swano. Disbarment entered. [For earlier order herein, see 516 U. S. 1108.]

No. D–1650. In re Disbarment of Gerdeman. Disbarment entered. [For earlier order herein, see 516 U. S. 1108.]

No. D–1651. In re Disbarment of Piper. Disbarment entered. [For earlier order herein, see 516 U. S. 1108.]

No. D–1652. In re Disbarment of Allen. Disbarment entered. [For earlier order herein, see 516 U. S. 1108.]

No. D–1654. In re Disbarment of Kelleher. Disbarment entered. [For earlier order herein, see 516 U. S. 1108.]

No. D–1674. In re Disbarment of Mims. Larry Mims, of Chicago, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1676. In re Disbarment of Summers. Robert L. Summers, of Millersport, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–57. McElrath *v.* Phillips; and

No. M–58. Abrams *v.* Urban Homeowners' Corporation of New Orleans. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 95–1111. Estate of Menna et al. *v.* St. Agnes Medical Center, 516 U. S. 1172. Motion of respondent for damages denied.

No. 95–8273. IN RE BERTASAVAGE. Petition for writ of prohibition denied.

Certiorari Granted

No. 95–1402. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF HUBERT, DECEASED, C & S SOVRAN TRUST CO. (GEORGIA) N. A., CO-EXECUTOR. C. A. 11th Cir. Certiorari granted. Reported below: 63 F. 3d 1083.

No. 95–1352. EDWARDS ET AL. *v.* BALISOK. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 70 F. 3d 1277.

Certiorari Denied

No. 95–711. GUSSIN *v.* NINTENDO OF AMERICA, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1433.

No. 95–815. GLOBE NEWSPAPER CO. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 61 F. 3d 86.

No. 95–1099. RUSSELL ET UX. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS CONSERVATOR FOR FIRST AMERICAN SAVINGS BANK. C. A. 11th Cir. Certiorari denied. Reported below: 62 F. 3d 401.

No. 95–1119. CITY OF BLUE SPRINGS ET AL. *v.* KINCADE. C. A. 8th Cir. Certiorari denied. Reported below: 64 F. 3d 389.

No. 95–1193. SARACO ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 61 F. 3d 863.

No. 95–1204. SKEPTON *v.* REICH, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 70 F. 3d 1257.

No. 95–1206. CORCES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 95–1222. SHAK *v.* TANAKA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 65 F. 3d 175.

No. 95–1226. KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL. *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 1503.

No. 95–1234. Dixon et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 68 F. 3d 1253.

No. 95–1267. Wilburta T. Holden Living Trust *v.* Joint City-County Board of Tax Assessors. Ct. App. Ga. Certiorari denied. Reported below: 218 Ga. App. XXVIII.

No. 95–1354. Liu *v.* New York City Police Department et al. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 216 App. Div. 2d 67, 627 N. Y. S. 2d 683.

No. 95–1357. Jones et ux. *v.* Garcia et ux. C. A. 5th Cir. Certiorari denied. Reported below: 63 F. 3d 411.

No. 95–1362. Tam *v.* Continental Insurance. C. A. 3d Cir. Certiorari denied. Reported below: 72 F. 3d 124.

No. 95–1364. Smith *v.* Glenolden Borough et al. C. A. 3d Cir. Certiorari denied. Reported below: 70 F. 3d 1257.

No. 95–1365. Archexpo Commerce & Industry Centre et al. *v.* International Ambassador Programs, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 68 F. 3d 337.

No. 95–1369. Rodime PLC *v.* Quantum Corp. C. A. Fed. Cir. Certiorari denied. Reported below: 65 F. 3d 1577.

No. 95–1372. Auvil et al. *v.* CBS "60 Minutes" et al. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 816.

No. 95–1375. Gill *v.* Territory of Guam. C. A. 9th Cir. Certiorari denied. Reported below: 61 F. 3d 688.

No. 95–1378. Furrer et ux. *v.* Brown et al. C. A. 8th Cir. Certiorari denied. Reported below: 62 F. 3d 1092.

No. 95–1380. Harris *v.* City of Virginia Beach et al. C. A. 4th Cir. Certiorari denied. Reported below: 69 F. 3d 532.

No. 95–1384. Smith & Nephew Dyonics, Inc. *v.* Violette. C. A. 1st Cir. Certiorari denied. Reported below: 62 F. 3d 8.

No. 95–1387. Atlantic Richfield Co. *v.* Beck et al. C. A. 9th Cir. Certiorari denied. Reported below: 62 F. 3d 1240.

No. 95–1388. St. Paul Mercury Insurance Co. et al. *v.* B & D Mechanical Contractors, Inc. C. A. 10th Cir. Certiorari denied. Reported below: 70 F. 3d 1115.

No. 95–1389. ALLARD, CHAPTER 7 TRUSTEE OF THE ESTATE OF CHOMAKOS, ET AL. *v.* FLAMINGO HILTON. C. A. 6th Cir. Certiorari denied. Reported below: 69 F. 3d 769.

No. 95–1398. ALSBERG, DBA ALSBERG BROTHERS BOATWORKS *v.* ROBERTSON, CHAPTER 7 TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 68 F. 3d 312.

No. 95–1403. STRUCK *v.* KENNEBEC COUNTY, MAINE, ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 668 A. 2d 411.

No. 95–1410. DART ET UX. *v.* DART ET AL. Cir. Ct. Mich., Ingham County. Certiorari denied.

No. 95–1411. WALSH *v.* IVKOVICH. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 274 Ill. App. 3d 1113, 691 N. E. 2d 1201.

No. 95–1412. BROWN ET AL. *v.* PLYWOOD PANELS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 67 F. 3d 293.

No. 95–1416. STRAMEL *v.* STONE. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 272 Ill. App. 3d 1116, 688 N. E. 2d 392.

No. 95–1422. SECAKUKU, CHAIRMAN, HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE *v.* HALE, PRESIDENT OF THE NAVAJO NATION, FOR AND ON BEHALF OF THE NAVAJO NATION. C. A. 9th Cir. Certiorari denied. Reported below: 65 F. 3d 1445.

No. 95–1424. VANYO *v.* FARGO WOMEN'S HEALTH ORGANIZATION, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 65 F. 3d 173.

No. 95–1443. STORK BRABANT B. V. ET AL. *v.* D'ALMEIDA ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 71 F. 3d 50.

No. 95–1451. CLASS OF GUTIERREZ ET AL. *v.* SANTA ANA UNIFIED SCHOOL DISTRICT ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 95–1457. HUTTON *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 95–1490. METCALFE *v.* KELLY, FKA METCALFE. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 655 So. 2d 1251.

No. 95–1506. Ifill *v.* District of Columbia et al. Ct. App. D. C. Certiorari denied. Reported below: 665 A. 2d 185.

No. 95–1548. Gaston *v.* Viclo Realty Co. et al. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 215 App. Div. 2d 174, 626 N. Y. S. 2d 131.

No. 95–1549. Zhadanov *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 74 F. 3d 1229.

No. 95–1563. Genish *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 66 F. 3d 341.

No. 95–1582. Jensen *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 69 F. 3d 906.

No. 95–1588. Jespersen *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 65 F. 3d 993.

No. 95–7203. Green *v.* Housing Authority of New Orleans. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 657 So. 2d 552.

No. 95–7506. Dobyne *v.* Alabama. Sup. Ct. Ala. Certiorari denied. Reported below: 672 So. 2d 1354.

No. 95–7645. Coley *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 126.

No. 95–7675. Stine *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 121.

No. 95–7690. Collado *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 125.

No. 95–7744. Baker *v.* Maryland. Cir. Ct. Harford County, Md. Certiorari denied.

No. 95–7974. McFarland *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 95–8017. Burress *v.* Unitarian-Universalist Society of Sacramento, Inc., et al. C. A. 9th Cir. Certiorari denied.

No. 95–8031. Franklyn *v.* Vista del Mar et al. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 119.

No. 95–8038. HAYES *v.* SPEARS, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 95–8042. SMITH *v.* MCBRIDE, SUPERINTENDENT, WESTVILLE CORRECTIONAL CENTER. C. A. 7th Cir. Certiorari denied. Reported below: 64 F. 3d 665.

No. 95–8043. RUSSELL *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 77 F. 3d 486.

No. 95–8045. RAMER *v.* JOHNSON ET AL. Sup. Ct. Okla. Certiorari denied.

No. 95–8057. MARKS *v.* HERRING, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 59 F. 3d 1247.

No. 95–8059. MINETTI *v.* LOCAL 9, INTERNATIONAL LONGSHOREMEN AND WAREHOUSEMEN UNION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–8063. BOGAN *v.* SESSIONS, ATTORNEY GENERAL OF ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 66 F. 3d 340.

No. 95–8067. GUCIKOVA *v.* CHROST. App. Ct. Mass. Certiorari denied. Reported below: 39 Mass. App. 1110, 655 N. E. 2d 1296.

No. 95–8068. HILL *v.* SAN MATEO COUNTY YOUTH AND FAMILY SERVICES DIVISION. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–8069. HILL *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 37 Cal. App. 4th 220, 44 Cal. Rptr. 2d 11.

No. 95–8073. DALE *v.* CHAMPION, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 72 F. 3d 137.

No. 95–8074. GREEN *v.* MELLON BANK, N. A. C. A. 3d Cir. Certiorari denied.

No. 95–8075. HAMILTON *v.* FRAGOSO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 66 F. 3d 335.

No. 95–8076. JAFFER *v.* BOARD OF MANAGERS OF THE REVERE CONDOMINIUM. Ct. App. N. Y. Certiorari denied. Reported below: 87 N. Y. 2d 952, 664 N. E. 2d 892.

No. 95–8077. JOHNSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 477.

No. 95–8078. NOBLES, AKA SHARIF *v.* WELBORN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 67 F. 3d 301.

No. 95–8080. WHITE *v.* ZIMMERS, CLERK, COURT OF COMMON PLEAS OF OHIO, MONTGOMERY COUNTY. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 95–8081. RAMOS *v.* BUNNELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 544.

No. 95–8084. NASH *v.* LACOMBE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 66 F. 3d 322.

No. 95–8085. SCOTT *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–8090. HURST *v.* SUPREME COURT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–8091. GRAHAM *v.* TURPIN, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–8094. KORNAHRENS *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 66 F. 3d 1350.

No. 95–8101. OLSEN *v.* SABAL MARKETING, INC., ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 661 So. 2d 824.

No. 95–8103. MORROW *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 266 Ga. 3, 463 S. E. 2d 472.

No. 95–8111. STEEVES *v.* BENSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 95–8112. LARRABEE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 222 App. Div. 2d 1129, 636 N. Y. S. 2d 963.

No. 95–8113. Shabazz *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 95–8114. Anderson *v.* Davis et al. C. A. 11th Cir. Certiorari denied.

No. 95–8116. Al-Wahhab *v.* Virginia et al. (two judgments). C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1260 (first judgment); 73 F. 3d 356 (second judgment).

No. 95–8124. Balele *v.* Klauser, Secretary, Department of Administration, et al. C. A. 7th Cir. Certiorari denied. Reported below: 74 F. 3d 1242.

No. 95–8125. Abraham *v.* Adcock et al. C. A. 8th Cir. Certiorari denied.

No. 95–8130. Swartz *v.* Iowa. Ct. App. Iowa. Certiorari denied. Reported below: 541 N. W. 2d 533.

No. 95–8132. Sims *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 167 Ill. 2d 483, 658 N. E. 2d 413.

No. 95–8135. Sedano *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 273 Ill. App. 3d 1110, 690 N. E. 2d 1089.

No. 95–8148. Idemudia *v.* Consolidated Rail Corporation. C. A. 6th Cir. Certiorari denied.

No. 95–8150. McGuffey *v.* Gwinnett County School System et al. C. A. 11th Cir. Certiorari denied.

No. 95–8177. D'Ambrosio *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 73 Ohio St. 3d 141, 652 N. E. 2d 710.

No. 95–8190. Johnson *v.* New York et al. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 941.

No. 95–8191. Mullholand *v.* Harris Corp. C. A. 6th Cir. Certiorari denied. Reported below: 72 F. 3d 130.

No. 95–8218. Wyldes *v.* Hundley, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 69 F. 3d 247.

No. 95–8250. Pitsch *v.* Michigan Attorney Grievance Commission. Sup. Ct. Mich. Certiorari denied.

No. 95–8257. STEINBERG *v.* STEINBERG. Sup. Ct. Va. Certiorari denied.

No. 95–8258. SEEHAN *v.* IOWA. C. A. 8th Cir. Certiorari denied. Reported below: 72 F. 3d 607.

No. 95–8284. CATON *v.* CLARKE, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 70 F. 3d 64.

No. 95–8308. DAVIS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 445 Pa. Super. 625, 664 A. 2d 1054.

No. 95–8359. ELROD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 474.

No. 95–8368. SIMMONS *v.* UNITED STATES; and
No. 95–8460. SANCHEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1251.

No. 95–8383. SUSSMAN *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 95–8384. CAIRNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 64 F. 3d 659.

No. 95–8406. KNIGHT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 65 F. 3d 178.

No. 95–8407. GRENNIER *v.* NAGLE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 73 F. 3d 364.

No. 95–8411. OKAYFOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 72 F. 3d 130.

No. 95–8419. McCORMACK *v.* THOMPSON, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 369.

No. 95–8432. BARNETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 65 F. 3d 180.

No. 95–8439. GIBSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 64 F. 3d 617.

No. 95–8440. PRATT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1255.

No. 95–8442. BRADFORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 78 F. 3d 1216.

No. 95–8444. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 72 F. 3d 134.

No. 95–8456. MONREAL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 64 F. 3d 355.

No. 95–8467. PADILLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 465.

No. 95–8471. BRATTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 478.

No. 95–8475. ROSE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1252.

No. 95–8480. CABALLERO YBARRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 362.

No. 95–8486. RENELUS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 72 F. 3d 888.

No. 95–8489. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 370.

No. 95–8490. ALEXANDER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 548.

No. 95–8498. GREENIDGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 941.

No. 95–8503. RODRIGUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 67 F. 3d 1312.

No. 95–856. JANKLOW, GOVERNOR OF SOUTH DAKOTA, ET AL. *v.* PLANNED PARENTHOOD, SIOUX FALLS CLINIC, ET AL. C. A. 8th Cir. Motion of National Right to Life Committee, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 63 F. 3d 1452.

Memorandum of JUSTICE STEVENS, respecting the denial of the petition for certiorari.

The Court's opinion in *United States* v. *Salerno,* 481 U. S. 739 (1987), correctly summarized a long established principle of our jurisprudence: "The fact that [a legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.,* at 745.

Unfortunately, the preceding sentence in the *Salerno* opinion went well beyond that principle. That sentence opens Part II of the opinion with a rhetorical flourish, stating that a facial challenge must fail unless there is "no set of circumstances" in which the statute could be validly applied. *Ibid.; post,* at 1178. That statement was unsupported by citation or precedent. It was also unnecessary to the holding in the case, for the Court effectively held that the statute at issue would be constitutional as applied in a large fraction of cases. See 481 U. S., at 749–750.

While a facial challenge may be more difficult to mount than an as-applied challenge, the dicta in *Salerno* "does not accurately characterize the standard for deciding facial challenges," and "neither accurately reflects the Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles." Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 236, 238 (1994). For these reasons, *Salerno*'s rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context.[1] Accordingly, there is no need for this Court affirmatively to disavow that unfortunate language, in the abortion context or otherwise, until it is clear that a federal court has ignored the appropriate principle and applied the draconian "no circumstance" dictum to deny relief in a case in which a facial challenge would otherwise be successful.[2] I thus concur in the denial of this petition.

---

[1] See, *e. g., Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833, 895 (1992) (statute facially invalid as "substantial obstacle" to exercise of right in "large fraction" of cases); *id.,* at 972–973 (REHNQUIST, C. J., concurring in judgment in part and dissenting in part) (arguing that "no circumstance" dictum should have led to different result); *Kraft Gen. Foods, Inc.* v. *Iowa Dept. of Revenue and Finance,* 505 U. S. 71, 82 (1992) (REHNQUIST, C. J., dissenting) (arguing that tax statute was facially valid because it would be constitutional under certain facts); *INS* v. *National Center for Immigrants' Rights, Inc.,* 502 U. S. 183, 188 (1991) (applying appropriate rule: "That the regulation may be invalid as applied in [some] cases, . . . does not mean that the regulation is facially invalid"); *Bowen* v. *Kendrick,* 487 U. S. 589, 602 (1988) (statute facially invalid under Establishment Clause only if, *inter alia,* law's "primary effect" is advancement of religion, or if it requires "excessive entanglement" between church and state); *id.,* at 627, n. 1 (Blackmun, J., dissenting) (pointing out and agreeing with majority's failure to apply "no circumstance" dictum); *Shaffer* v. *Heitner,* 433 U. S. 186 (1977)

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

In this case, the United States Court of Appeals for the Eighth Circuit declared unconstitutional a South Dakota law which requires a physician to notify a pregnant minor's parent of an impending abortion 48 hours before the abortion is to be performed.[1]

(examining facial validity of state statute permitting exercise of personal jurisdiction over defendant without reference to whether statute was constitutional as applied to petitioner).

These cases, along with other decisions and the holding in *Salerno* itself (that the challenged Act was constitutional in *most* circumstances, not merely *one*), should have braced the dissent against the minor risk of whiplash from the "head-snapping" observation, *post*, at 1180, that our "doctrinal pattern is somewhat more complex" than *Salerno*'s "no circumstance" language suggests, Fallon, Making Sense of Overbreadth, 100 Yale L. J. 853, 859, n. 29 (1991) (citing cases).

[2] In all likelihood, the decision of the Fifth Circuit applying the "no circumstance" test would have been decided the same way even if that court had utilized the "large fraction" test applied by the Eighth Circuit in this case. See *Barnes* v. *Moore*, 970 F. 2d 12, 14 (CA5 1992) (noting that the provisions at issue were "substantially identical" to provisions upheld in *Casey*).

Furthermore, it is not at all clear to me, given intervening statements by Members of this Court, see *Fargo Women's Health Organization* v. *Schafer*, 507 U. S. 1013, 1014 (1993), that subsequent Fifth Circuit panels would follow *Barnes*' application of the "no circumstance" test, providing yet another reason to deny the petition in this case.

[1] South Dakota Codified Laws § 34-23A-7 (1994 rev.) provides, in relevant part:

"No abortion may be performed upon an unemancipated minor or upon a female for whom a guardian has been appointed because of a finding of incompetency, until at least forty-eight hours after written notice of the pending operation has been delivered in the manner specified in this section. The notice shall be addressed to the parent at the usual place of abode of the parent and shall be delivered personally to the parent by the physician or an agent. In lieu of such delivery, notice may be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee, which means a postal employee can only deliver the mail to the authorized addressee. If

The court's basis for the invalidation was that "*a large fraction* of minors seeking pre-viability abortions would be unduly burdened by [the] statute, despite its abuse exception,"[2] *Planned Parenthood, Sioux Falls Clinic* v. *Miller,* 63 F. 3d 1452, 1463 (1995) (emphasis added).

This decision is questionable enough that we should, since the invalidation of state law is at issue, accord review. Among other things, it rested upon the court's belief that "it seems, South Dakota's abuse exception will sometimes result in parental notification, even if after-the-fact." *Id.,* at 1461. That reasoning is inconsistent with our holding in *Ohio* v. *Akron Center for Reproductive Health,* 497 U. S. 502, 514 (1990), another case involving a parental notification provision, that "[t]he Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur." The Eighth Circuit's holding is also dependent on the questionable conclusions (1) that "parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass," 63 F. 3d, at 1460, see *Bellotti* v. *Baird,* 443 U. S. 622 (1979), and (2) that the South Dakota law's exception for abused

---

notice is made by certified mail, the time of delivery shall be deemed to occur at twelve o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing."

[2] South Dakota Codified Laws §34–23A–7 (1994 rev.) sets forth the following exceptions to its notice requirement:

"No notice is required under this section if:

"(1) The attending physician certifies in the pregnant minor's medical record that, on the basis of the physician's good faith clinical judgment, a medical emergency exists that so complicates the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function and there is insufficient time to provide the required notice; or

"(2) The person who is entitled to notice certifies in writing that he has been notified; or

"(3) The pregnant minor declares, or provides information that indicates, that she is an abused or neglected child as defined in §26–8A–2 and the attending physician has reported the alleged or suspected abuse or neglect as required in accordance with [state law]. In such circumstances, the department of social services, the state's attorney and law enforcement officers to whom the report is made or referred for investigation or litigation shall maintain the confidentiality of the fact that she has sought or obtained an abortion and shall take all necessary steps to ensure that this information is not revealed to her parents."

and neglected minors did not satisfy the need for a bypass procedure, 63 F. 3d, at 1460–1463.

Beyond these issues, however (or, more accurately, preceding them), is another question that virtually cries out for our review. In *United States* v. *Salerno*, 481 U. S. 739 (1987), summarizing a long established principle of our jurisprudence, we observed:

> "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Id.*, at 745.

It has become questionable whether, for some reason, this clear principle does not apply in abortion cases. As I observed three Terms ago in a case very similar to this one, we have sent mixed signals on the question—seemingly employing an overbreadth approach in *Roe* v. *Wade*, 410 U. S. 113 (1973), but explicitly rejecting that approach in such later abortion cases as *Ohio* v. *Akron Center for Reproductive Health*, *supra*, at 514, and *Rust* v. *Sullivan*, 500 U. S. 173, 183 (1991).[3] In dissenting from denial of certiorari in *Ada* v. *Guam Soc. of Obstetricians & Gynecologists*,

---

[3] See also *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 524 (1989) (O'CONNOR, J., concurring in part and concurring in judgment) ("[S]ome quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional"). JUSTICE STEVENS' memorandum in support of the denial of certiorari says that the *Salerno* rule "has been properly ignored in subsequent cases even outside the abortion context." *Ante*, at 1175. If he means by this that the rule has *consistently* been ignored, the statement is proved false by the cases cited here in text, where the rule was both recited and followed. (And there are other post-*Salerno* cases reciting and applying the rule outside the abortion context, see, *e. g., Anderson* v. *Edwards*, 514 U. S. 143, 155–156, n. 6 (1995), and *Reno* v. *Flores*, 507 U. S. 292, 301, 309 (1993).) If, on the other hand, JUSTICE STEVENS merely means that the *Salerno* rule has *sometimes* "been ignored," though it has other times been *applied*, then he makes a good case for granting, rather than denying, certiorari.

506 U. S. 1011, 1013 (1992), I expressed my view that "[t]he Court did not purport to change this well-established rule . . . in *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992)." Since then, two Members of the *Casey* majority have expressed their view that *Salerno* is "inconsistent with *Casey.*" See *Fargo Women's Health Organization* v. *Schafer,* 507 U. S. 1013, 1014 (1993) (O'CONNOR, J., joined by SOUTER, J., concurring).

In this case—after reviewing the incompatible pronouncements of the Court's opinions on this subject, and remarking that "even the Justices of the Supreme Court dispute *Casey*'s effect," 63 F. 3d, at 1457—the Court of Appeals concluded, in effect, that *Salerno* had been chewed up by the "ad hoc nullification machine" which is our abortion jurisprudence, *Madsen* v. *Women's Health Center, Inc.,* 512 U. S. 753, 785 (1994) (SCALIA, J., dissenting). The court decided that *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992), without so much as alluding to the facial-challenge rule, "effectively overruled *Salerno* for facial challenges to abortion statutes," 63 F. 3d, at 1458. This holding conflicts head on with a post-*Casey* decision of the Fifth Circuit. In *Barnes* v. *Moore,* 970 F. 2d 12, cert. denied, 506 U. S. 1021 (1992), the Fifth Circuit rejected a facial challenge to the Mississippi Informed Consent to Abortion Act. In the process, it said that "[b]ecause the plaintiffs are challenging the facial validity of the Mississippi Act, they must 'establish that no set of circumstances exists under which the Act would be valid,'" 970 F. 2d, at 14, adding that "we do not interpret *Casey* as having overruled, *sub silentio,* longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes," *id.,* at 14, n. 2. The split between the Fifth and Eighth Circuits is unmistakably clear. The Third Circuit has also weighed in on this question (albeit in dictum), siding with the Eighth Circuit. See *Casey* v. *Planned Parenthood of Southeastern Pa.,* 14 F. 3d 848, 863, n. 21 (1994).

The *Salerno* question could not be more squarely presented. The Court of Appeals explained that *"[t]he critical issue* in this case is . . . what is the standard for a challenge to the facial constitutionality of an abortion law?" 63 F. 3d, at 1456 (emphasis added). It specifically acknowledged that "Planned Parenthood cannot meet the *Salerno* test." *Id.,* at 1457. Had the Court of Appeals not concluded that the *Salerno* rule has been selectively (and *sub silentio*) nullified in abortion cases, respondents' facial challenge quite simply would have failed.

JUSTICE STEVENS' memorandum in support of the denial of this petition provides even stronger reasons than I have why it should be granted. JUSTICE STEVENS asserts that *Casey* could not possibly have been contrary to the "no set of circumstances" rule because, contrary to the repeated statement of our cases, *that rule never existed.* For that head-snapping proposition, he relies upon no less weighty authority than a law review article by Michael C. Dorf. According to that author, THE CHIEF JUSTICE's statement on behalf of the Court in *Salerno* was not only "wrong" but "draconian." Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 238, 239 (1994); see *ante,* at 1176. But if that is so, if *Salerno* is a dead letter *even outside of the abortion context,* all the more reason to grant certiorari and make that clear.[4] For the courts of appeals regularly enforce that supposed dead letter, often in cases in which its "draconian" character prevents the facial challenge from succeeding. See, *e. g., Chemical Waste Management, Inc.* v. *United States Environmental Protection Agency,* 56 F. 3d 1434, 1437 (CADC 1995) ("We discern at least one scenario where the off-site rule would be procedurally valid. . . . While this hypothetical scenario may not be common, it is sufficient to establish that petitioners' facial challenge must fail"); *United States* v. *Mena,* 863 F. 2d 1522, 1527 (CA11 1989) ("[T]he defendants have simply failed even to suggest 'that no set of circumstances exists under which the Act would be valid.' Such is the defendant's burden in a case challenging the facial validity of a congressional enactment on other than first-amendment grounds"); *Roulette* v. *Seattle,* 78 F. 3d 1425, 1430 (CA9 1996) ("Plaintiffs have conceded that 'the city may prevent individuals or groups of people from sitting or lying across a sidewalk in such a way as to prevent others from passing.' The Seattle ordinance plainly may be applied to such cases, and plaintiffs' facial substantive due process challenge therefore fails") (citation omitted); *Government Suppliers Consolidating Servs., Inc.* v. *Bayh*, 975 F. 2d 1267, 1283 (CA7 1992); *Dean* v. *McWherter*, 70 F. 3d 43, 45 (CA6 1995); *National Treasury Employees Union* v. *Bush*, 891 F. 2d 99, 101 (CA5 1989) ("[B]ecause not every application of the Order would be invalid, the Order is facially valid"); *Jordan* v. *Jackson*, 15 F. 3d 333, 343–344 (CA4 1994); *Giusto* v. *INS*, 9 F. 3d 8, 10 (CA2 1993).

---

[4] While we are in the process of adopting Professor Dorf's revisionist view of *Salerno,* we could also embrace his modest proposal for what ought to replace the rule described in that case. His proposal is not, curiously enough, the regime that JUSTICE STEVENS suggests, but rather total elimination of the distinction between facial and as-applied challenges. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 294 (1994).

Finally, I cannot let pass without comment JUSTICE STEVENS' suggestion that Fifth Circuit panels might, in future abortion cases, ignore the clear language of *Salerno*, and the Fifth Circuit's own decision in *Barnes*, "given intervening statements by Members of this Court"—by which he means the memorandum of JUSTICE O'CONNOR, joined by JUSTICE SOUTER, concurring in the Court's order of April 2, 1993, denying (without opinion) the application for stay and injunction pending appeal in *Fargo Women's Health Organization* v. *Schafer*, *supra*. See *ante*, at 1176, n. 2. That the Fifth Circuit *might* give such authoritative effect to this two-Justice concurrence is certainly true; courts of appeals, no less than practitioners, sometimes count votes instead of following cases. But I am surprised to find that practice endorsed by JUSTICE STEVENS, who has hitherto taken a dim view of separate writings appended to discretionary (and unexplained) denials, calling "all opinions dissenting from the denial of certiorari" "totally unnecessary" and "examples of the purest form of dicta." *Singleton* v. *Commissioner*, 439 U. S. 940, 944–945 (1978) (STEVENS, J., respecting denial of certiorari). More fundamentally, I find it hard to understand why one who believes that *Salerno*'s "no set of circumstances" rule is nothing more than unwise, rigid, and inaccurate dictum, *ante*, at 1175, would not seize upon this opportunity "affirmatively to disavow" it, *ante*, at 1176, instead of hoping that the courts of appeals will be induced to abandon it by reading the tea leaves of concurring opinions. Today's denial serves only one rational purpose: It makes our abortion ad hoc nullification machine as stealthful as possible.

For the foregoing reasons, I dissent from the Court's denial of the petition for certiorari.

No. 95–1572. ALLEN *v.* UNITED STATES. C. A. 6th Cir. Motion of Michael Allen, personal representative of the estate of Albert A. Allen, to be substituted as petitioner in place of Albert

A. Allen, deceased, denied. Certiorari denied. Reported below: 73 F. 3d 64.

Rehearing Denied

No. 95–7761. CALHOUN *v.* HUSKISSON ET AL., 516 U. S. 1180; and

No. 95–7978. LEMON *v.* JOHNSON, WARDEN, 516 U. S. 1184. Petitions for rehearing denied.

APRIL 30, 1996

Dismissal Under Rule 46

No. 95–928. ATHERTON ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR CITY SAVINGS, F. S. B. C. A. 3d Cir. [Certiorari granted, *ante*, p. 1133.] Writ of certiorari dismissed as to Gordon E. Allen and Peter R. Kellogg under this Court's Rule 46.1.

MAY 2, 1996

Miscellaneous Order

No. A–894. CALDERON, WARDEN, ET AL. *v.* CALIFORNIA FIRST AMENDMENT COALITION ET AL. D. C. N. D. Cal. Application for stay pending appeal, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

MAY 3, 1996

Dismissal Under Rule 46

No. 95–1699. AMPEX CORP. *v.* FRYMIRE ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 61 F. 3d 757.

Certiorari Granted

No. 95–8836 (A–890). FELKER *v.* TURPIN, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, granted. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. The parties shall submit briefs limited to the following questions: "(1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (Act), and in particular § 106(b)(3)(E), 28 U. S. C.

§ 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court. (2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U. S. C. § 2241. (3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, cl. 2 of the Constitution." The parties' briefs are to be filed with the Clerk of this Court and served upon opposing counsel on or before 2 p.m., Friday, May 17, 1996. Reply briefs, if any, may be filed with the Clerk of this Court and served upon opposing counsel on or before 2 p.m., Tuesday, May 28, 1996. The Solicitor General is invited to file a brief expressing the views of the United States. Briefs may be submitted in compliance with this Court's Rule 33.2 to be replaced as soon as possible with briefs prepared under Rule 33.1. Rule 29.2 does not apply. Oral argument is set for Monday, June 3, 1996, at 10 a.m. Reported below: 83 F. 3d 1303.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

In my opinion, it is both unnecessary and profoundly unwise for the Court to order expedited briefing of the important questions raised by the petition for certiorari and application for a writ of habeas corpus. Even if the majority were right that this petition squarely presents substantial constitutional questions about the power of Congress to limit this Court's jurisdiction, our consideration of them surely should be undertaken with the utmost deliberation, rather than unseemly haste. Accordingly, I respectfully dissent from the entry of the foregoing order.

Certiorari Denied

No. 95–8845 (A–895). WILLIAMS *v.* CALDERON, WARDEN. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 83 F. 3d 281.

MAY 13, 1996

Dismissal Under Rule 46

No. 95–1087. LONDON ET AL. *v.* CONCHA ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 62 F. 3d 1493.

Certiorari Granted—Vacated and Remanded

No. 95–851. UNIVERSITY OF HOUSTON ET AL. *v.* CHAVEZ. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Seminole Tribe of Fla.* v. *Florida, ante,* p. 44. Reported below: 59 F. 3d 539.

No. 95–7750. ADAMS *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bailey* v. *United States,* 516 U. S. 137 (1995). Reported below: 68 F. 3d 471.

No. 95–7831. OLDS *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bailey* v. *United States,* 516 U. S. 137 (1995). Reported below: 70 F. 3d 116.

No. 95–8128. CARTER *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bailey* v. *United States,* 516 U. S. 137 (1995). Reported below: 72 F. 3d 130.

Miscellaneous Orders

No. A–733 (95–8566). YOUNGS *v.* WHELESS, BANKRUPTCY JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL. C. A. 5th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–820. JAMES *v.* COLLINS. Application for preliminary injunction, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–1587. IN RE DISBARMENT OF GENINS. Disbarment entered. [For earlier order herein, see 515 U. S. 1185.]

No. D–1655. IN RE DISBARMENT OF TANNER. Disbarment entered. [For earlier order herein, see 516 U. S. 1144.]

No. D–1656. IN RE DISBARMENT OF MARKOVITCH. Disbarment entered. [For earlier order herein, see 516 U. S. 1144.]

No. D–1657. IN RE DISBARMENT OF DAMERON. Disbarment entered. [For earlier order herein, see 516 U. S. 1169.]

No. D–1660. In re Disbarment of Tighe. Disbarment entered. [For earlier order herein, see 516 U. S. 1169.]

No. D–1677. In re Disbarment of Witt. Ralph H. Witt, of Atlanta, Ga., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1678. In re Disbarment of Hirsh. Stuart H. Hirsh, of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1679. In re Disbarment of Brown. David M. Brown, of Sherman Oaks, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1680. In re Disbarment of Calvert. David Ross Calvert, of Englewood, Colo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–61. Hoesterey *v.* City of Cathedral City et al.; and

No. M–62. Jardine *v.* Brown, Secretary of Veterans Affairs. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 95–853. M. L. B. *v.* S. L. J., Individually and as Next Friend of the Minor Children, S. L. J. and M. L. J., et ux. Sup. Ct. Miss. [Certiorari granted, *ante*, p. 1118.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 95–865. United States *v.* Winstar Corp. et al. C. A. Fed. Cir. [Certiorari granted, 516 U. S. 1087.] Motion of respondent Glendale Federal Bank, FSB, for leave to file a supplemental brief after argument denied.

No. 95–1748. Aaron *v.* Public Utilities Commission of California. Sup. Ct. Cal. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 95–7587. Shieh *v.* Kakita et al. C. A. 9th Cir.; and
No. 95–7589. Shieh *v.* Krieger et al. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 343] denied.

No. 95–7588. Shieh *v.* United States Court of Appeals for the Ninth Circuit. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 343] denied.

No. 95–7693. Jones *v.* American Civil Liberties Union Foundation et al. C. A. 8th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1118] denied.

No. 95–8785. Kaczynski *v.* United States. C. A. 9th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 95–8633. In re Day. Petition for writ of habeas corpus denied.

No. 95–8209. In re Williams;
No. 95–8251. In re Cordova; and
No. 95–8281. In re Reeves. Petitions for writs of mandamus denied.

No. 95–1647. In re Bio-Recovery, Inc. Petition for writ of prohibition denied.

Certiorari Granted

No. 95–1441. Blessing, Director, Arizona Department of Economic Security *v.* Freestone et al., on Behalf of Their Minor Children. C. A. 9th Cir. Certiorari granted. Reported below: 68 F. 3d 1141.

No. 95–1081. Ingalls Shipbuilding, Inc., et al. *v.* Director, Office of Workers' Compensation Programs, Department of Labor, et al. C. A. 5th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 65 F. 3d 460.

No. 95–7452. Lynce *v.* Mathis, Superintendent, Tomoka Correctional Institution, et al. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition.

Certiorari Denied

No. 95–847. Gambino *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 59 F. 3d 353.

No. 95–965. Stern *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 68 F. 3d 485.

No. 95–1036. Menken et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 309.

No. 95–1040. Alabama *v.* Seeley. Ct. Crim. App. Ala. Certiorari denied. Reported below: 669 So. 2d 209.

No. 95–1075. Chavez *v.* University of Houston et al. C. A. 5th Cir. Certiorari denied. Reported below: 59 F. 3d 539.

No. 95–1084. Alaska *v.* Babbitt, Secretary of the Interior, et al.; and
No. 95–1496. Alaska Federation of Natives *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 698.

No. 95–1103. Wapnick et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 60 F. 3d 948.

No. 95–1109. Murdock *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 63 F. 3d 1391.

No. 95–1121. Calvo *v.* United States Court of Appeals for the Eleventh Circuit. C. A. 11th Cir. Certiorari denied.

No. 95–1162. Sumpter *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 64 F. 3d 663.

No. 95–1233. Cost Control Marketing & Sales Management of Virginia, Inc., et al. *v.* Cisneros, Secretary of Housing and Urban Development. C. A. 4th Cir. Certiorari denied. Reported below: 64 F. 3d 920.

No. 95–1240. Campbell *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 661 So. 2d 1321.

No. 95–1243. Plunk *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 68 F. 3d 482.

No. 95–1246. Smith *v.* Runyon, Postmaster General. C. A. 11th Cir. Certiorari denied. Reported below: 65 F. 3d 182.

No. 95–1249. Chiles, Governor of Florida, et al. *v.* United States et al. C. A. 11th Cir. Certiorari denied. Reported below: 69 F. 3d 1094.

No. 95–1259. Holmes, dba Holmes Bi-Rite Supermarket *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 67 F. 3d 314.

No. 95–1266. Alexander *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 63 F. 3d 820.

No. 95–1275. LeFevre et al. *v.* Brown, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 66 F. 3d 1191.

No. 95–1288. All American Asphalt et al. *v.* Hyles et al. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 95–1344. Chavez *v.* Housing Authority of the City of El Paso. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 897 S. W. 2d 523.

No. 95–1373. Lebron *v.* National Railroad Passenger Corporation (AMTRAK). C. A. 2d Cir. Certiorari denied. Reported below: 69 F. 3d 650 and 74 F. 3d 371.

No. 95–1405. Lamb *v.* Citibank, N. A. C. A. 2d Cir. Certiorari denied. Reported below: 122 F. 3d 1056.

No. 95–1408. Carter *v.* Montana Department of Transportation et al. Sup. Ct. Mont. Certiorari denied. Reported below: 274 Mont. 39, 905 P. 2d 1102.

No. 95–1418. Perego et al. *v.* King Instrument Corp. C. A. Fed. Cir. Certiorari denied. Reported below: 65 F. 3d 941.

No. 95–1419. Kiowa Tribe of Oklahoma *v.* Hoover. Sup. Ct. Okla. Certiorari denied. Reported below: 909 P. 2d 59.

No. 95–1423. Cully *v.* St. Augustine Manor et al. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 95–1426. Estate of Hansen *v.* City of New Haven. App. Ct. Conn. Certiorari denied. Reported below: 38 Conn. App. 902, 659 A. 2d 1231.

No. 95–1432. National Association of Review Appraisers & Mortgage Underwriters, Inc., et al. *v.* Appraisal Foundation et al. C. A. 8th Cir. Certiorari denied. Reported below: 64 F. 3d 1130.

No. 95–1434. Hughes Salaried Retirees Action Committee et al. *v.* Administrator, Hughes Non-Bargaining Retirement Plan. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 686.

No. 95–1435. Graven Auction Co., Inc., et al. *v.* Fink, Trustee. C. A. 8th Cir. Certiorari denied. Reported below: 64 F. 3d 453.

No. 95–1437. Smith *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 342 N. C. 407, 464 S. E. 2d 45.

No. 95–1452. Singer *v.* Sheriff, Fulton County, et al. C. A. 2d Cir. Certiorari denied. Reported below: 63 F. 3d 110.

No. 95–1456. Sparky's Waterfront Saloon, Inc. *v.* Cosmopolitan, Inc., et al. C. A. 3d Cir. Certiorari denied. Reported below: 74 F. 3d 1227.

No. 95–1459. Irons *v.* Karceski et al. C. A. D. C. Cir. Certiorari denied. Reported below: 74 F. 3d 1262.

No. 95–1461. Petitte Brothers Mining Co., Inc., et al. *v.* Connors, Trustee, United Mine Workers of America 1950 Pension Plan, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 70 F. 3d 637.

No. 95–1462. St. Louis County, Missouri *v.* Kornblum. C. A. 8th Cir. Certiorari denied. Reported below: 72 F. 3d 661.

No. 95–1463. Thomason *v.* Prince George's County, Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 105 Md. App. 807.

No. 95–1464. Hazen *v.* Cooper et al. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 95–1465. VILLAGE OF DEPEW *v.* GUMMO. C. A. 2d Cir. Certiorari denied. Reported below: 75 F. 3d 98.

No. 95–1470. CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND *v.* SHERWIN-WILLIAMS CO. C. A. 7th Cir. Certiorari denied. Reported below: 71 F. 3d 1338.

No. 95–1471. MOTLEY *v.* MARATHON OIL CO. C. A. 10th Cir. Certiorari denied. Reported below: 71 F. 3d 1547.

No. 95–1473. PRAXAIR, INC. *v.* FLORIDA POWER & LIGHT CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 64 F. 3d 609.

No. 95–1474. NEW MEXICO DEPARTMENT OF HUMAN SERVICES ET AL. *v.* JOSEPH A. ET AL., BY THEIR NEXT FRIEND, WOLFE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 1081.

No. 95–1479. WHEREHOUSE ENTERTAINMENT, INC., ET AL. *v.* MCMAHAN & CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 65 F. 3d 1044.

No. 95–1486. HOLMES *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 74 F. 3d 1237.

No. 95–1502. FOX *v.* HINSON, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. Reported below: 76 F. 3d 1244.

No. 95–1518. FLORIDA *v.* FRAZIER. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 664 So. 2d 985.

No. 95–1519. YOUNG *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 70 F. 3d 130.

No. 95–1520. ARIZONA ET AL. *v.* HOOK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 544.

No. 95–1536. FLORIDA *v.* DUPONT. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 659 So. 2d 405.

No. 95–1541. HENNESSEY *v.* BLALACK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 473.

No. 95–1545. SUTTON *v.* GIBSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 464.

No. 95–1550. WEINBERG *v.* MANAGEMENT COMPANY ENTERTAINMENT GROUP ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 71 F. 3d 405.

No. 95–1570. FRIED *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 436 Pa. Super. 642, 647 A. 2d 262.

No. 95–1577. CONLEY ET AL. *v.* EUGENE. C. A. 5th Cir. Certiorari denied. Reported below: 65 F. 3d 1299.

No. 95–1580. SMITH ET UX. *v.* NEW HAMPSHIRE BOARD OF LICENSURE FOR LAND SURVEYORS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 70 F. 3d 1253.

No. 95–1597. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1264.

No. 95–1600. CENTRA, INC., ET AL. *v.* CHANDLER INSURANCE CO., LTD., ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 248 Neb. 844, 540 N. W. 2d 318.

No. 95–1604. KLETZELMAN *v.* CAPISTRANO UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1279.

No. 95–1606. BENNETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 113.

No. 95–1617. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 479.

No. 95–1618. GOWIN *v.* DADE COUNTY AUTO TAG OFFICE, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES. C. A. 11th Cir. Certiorari denied. Reported below: 55 F. 3d 636.

No. 95–1620. SHRADER *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1263.

No. 95–1627. RAMOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1281.

No. 95–1632. SOARES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 68 F. 3d 19.

No. 95–1645. Jackson *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 941.

No. 95–1652. Dyson *v.* City of Pawtucket et al. Sup. Ct. R. I. Certiorari denied. Reported below: 670 A. 2d 233.

No. 95–1655. Tate *v.* United States. C. A. Armed Forces. Certiorari denied. Reported below: 43 M. J. 464.

No. 95–1660. Nordvik et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 1489.

No. 95–1663. Catalfo *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 64 F. 3d 1070.

No. 95–1667. Baker et ux. *v.* Internal Revenue Service. C. A. 9th Cir. Certiorari denied. Reported below: 74 F. 3d 906.

No. 95–6992. Morrow *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 910 S. W. 2d 471.

No. 95–7262. Jackson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 67 F. 3d 297.

No. 95–7317. Hooper *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 65 F. 3d 169.

No. 95–7434. Mitchell *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 36 Cal. App. 4th 672, 42 Cal. Rptr. 2d 537.

No. 95–7436. Jackson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 67 F. 3d 1359.

No. 95–7505. Davis *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 660 So. 2d 1228.

No. 95–7621. Wolfe *v.* Montana Department of Corrections and Human Services. C. A. 9th Cir. Certiorari denied.

No. 95–7720. Williams *v.* Love, Superintendent, State Correctional Institution at Huntingdon, et al. C. A. 3d Cir. Certiorari denied.

No. 95–7728. DeBarr *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 111 Nev. 1712, 916 P. 2d 194.

No. 95–7777. MORRIS *v.* KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 307.

No. 95–7801. PONDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 63 F. 3d 1112.

No. 95–7863. PRYCE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 95–7886. HAWKINS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 10 Cal. 4th 920, 897 P. 2d 574.

No. 95–7968. KAILEY *v.* NORTON, ATTORNEY GENERAL OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 74 F. 3d 1249.

No. 95–8146. MOON *v.* THOMAS, WARDEN. Super. Ct. Butts County, Ga. Certiorari denied.

No. 95–8149. LOWE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 95–8152. MULAZIM *v.* NUCKLES. C. A. 6th Cir. Certiorari denied.

No. 95–8158. COTNER *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 74 F. 3d 1248.

No. 95–8166. HOUSE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 911 S. W. 2d 705.

No. 95–8189. WHEELER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 269 Ill. App. 3d 1129, 685 N. E. 2d 454.

No. 95–8192. ODEN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 74 Ohio St. 3d 234, 658 N. E. 2d 273.

No. 95–8196. WILLIS *v.* BELL, ROSENBERG & HUGHES ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–8197. RASHI *v.* CONLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 69 F. 3d 537.

No. 95–8198. STEPHEN *v.* HEWITT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 370.

No. 95–8199. Hanus et vir *v.* Sears, Roebuck & Co. et al. Ct. App. Neb. Certiorari denied. Reported below: 3 Neb. App. lxxiv.

No. 95–8202. Harvey *v.* Hamill et al. Sup. Ct. Del. Certiorari denied. Reported below: 670 A. 2d 1338.

No. 95–8213. Tedder *v.* Johnson, Warden. C. A. 11th Cir. Certiorari denied.

No. 95–8214. Riker *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 111 Nev. 1316, 905 P. 2d 706.

No. 95–8215. Roberts *v.* Hanks, Superintendent, Wabash Valley Correctional Institute. C. A. 7th Cir. Certiorari denied. Reported below: 73 F. 3d 364.

No. 95–8216. Wesley *v.* Jenkins, Chief of Police, Odessa, Texas, et al. C. A. 5th Cir. Certiorari denied. Reported below: 74 F. 3d 1238.

No. 95–8217. Boyd *v.* North Carolina. Super. Ct. N. C., Surry County. Certiorari denied.

No. 95–8219. Taylor *v.* Hanks, Superintendent, Wabash Valley Correctional Institute. C. A. 7th Cir. Certiorari denied.

No. 95–8221. Hoyett *v.* Jones, Commissioner, Alabama Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 95–8223. Dwyer *v.* Sparks. Sup. Ct. Colo. Certiorari denied.

No. 95–8226. In re Bethea. Ct. Common Pleas of Dauphin County, Pa. Certiorari denied.

No. 95–8227. Igbo *v.* Church of Jesus Christ of Latter-day Saints et al. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1262.

No. 95–8228. Melancon *v.* Rader, Warden. C. A. 5th Cir. Certiorari denied.

No. 95–8230. Jeffress *v.* Suter, Clerk, Supreme Court of the United States. C. A. D. C. Cir. Certiorari denied. Reported below: 70 F. 3d 638.

No. 95–8232. Nunez *v.* Costello, Superintendent, Midstate Correctional Facility, et al. C. A. 2d Cir. Certiorari denied. Reported below: 89 F. 3d 826.

No. 95–8233. Lancour *v.* Moore, Director, South Carolina Department of Corrections, et al. C. A. 4th Cir. Certiorari denied. Reported below: 60 F. 3d 823.

No. 95–8236. Jones *v.* Washington, Director, Illinois Department of Corrections. C. A. 7th Cir. Certiorari denied.

No. 95–8239. Sprankle *v.* Sprankle. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 667 So. 2d 784.

No. 95–8240. Johnson-Bey *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 477.

No. 95–8243. Bell *v.* Brookshire, Sheriff, Ector County, Texas, et al. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 474.

No. 95–8247. Craig *v.* Montana. Sup. Ct. Mont. Certiorari denied. Reported below: 274 Mont. 140, 906 P. 2d 683.

No. 95–8249. Roberson *v.* Suarez Corp. et al. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 95–8252. Brown *v.* United States Congress et al. C. A. 11th Cir. Certiorari denied.

No. 95–8254. Tafoya *v.* Zavaras, Executive Director, Colorado Department of Corrections, et al. C. A. 10th Cir. Certiorari denied. Reported below: 77 F. 3d 493.

No. 95–8255. Thompson *v.* New Jersey et al. C. A. 3d Cir. Certiorari denied.

No. 95–8256. Tedder et vir *v.* Pace et al. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 126.

No. 95–8259. Olenick *v.* New York Telephone et al. C. A. 2d Cir. Certiorari denied.

No. 95–8260. Paster *v.* Tensas Basin Levee District. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 659 So. 2d 857.

No. 95–8268. LUKEN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 192.

No. 95–8275. WINDELBERG *v.* THOMPSON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 95–8278. SMITH *v.* NUTH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 1233.

No. 95–8285. SHABAZZ *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 95–8289. THOMAS *v.* EVANS. C. A. 11th Cir. Certiorari denied.

No. 95–8290. YEOMAN *v.* DILLEY ET AL. C. A. 6th Cir. Certiorari denied.

No. 95–8293. STEVENS *v.* CITY OF LINCOLN, ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 95–8294. PICKLE *v.* DUTTON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 72 F. 3d 130.

No. 95–8298. DAWSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–8306. HARVEY *v.* WASHINGTON, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 95–8315. JETER *v.* DIXON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 112.

No. 95–8324. SWENDRA *v.* WOODFORD, JUDGE, JEFFERSON COUNTY DISTRICT COURT, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 76 F. 3d 393.

No. 95–8341. POLUR *v.* GRIEVANCE COMMITTEE FOR THE SOUTHERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 67 F. 3d 3.

No. 95–8352. AUGUSTIN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 666 So. 2d 218.

No. 95–8360. Dilworth *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 169 Ill. 2d 195, 661 N. E. 2d 310.

No. 95–8363. Hosier *v.* Wolff et al. C. A. 9th Cir. Certiorari denied.

No. 95–8364. Emery *v.* Plantier, Superintendent, New Jersey Adult Diagnostic and Treatment Center. C. A. 3d Cir. Certiorari denied.

No. 95–8392. Robinson *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 342 N. C. 74, 463 S. E. 2d 218.

No. 95–8422. Lyman *v.* Hopkins, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 69 F. 3d 541.

No. 95–8424. Linton *v.* Alaska. Ct. App. Alaska. Certiorari denied. Reported below: 901 P. 2d 439.

No. 95–8428. Malloy *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 124.

No. 95–8434. Usher *v.* Duncan, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 371.

No. 95–8447. Darden *v.* Barnett, Superintendent, Eastern Correctional Institution. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 1231.

No. 95–8463. Washington *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 69 F. 3d 542.

No. 95–8464. Trippet *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–8473. Neal *v.* Cooper, Warden, et al. C. A. 7th Cir. Certiorari denied.

No. 95–8476. Price *v.* McDade, Superintendent, Harnett Correctional Institution, et al. C. A. 4th Cir. Certiorari denied. Reported below: 64 F. 3d 659.

No. 95–8477. Walls *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 342 N. C. 1, 463 S. E. 2d 738.

No. 95–8485. PALACIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 879.

No. 95–8488. WEST *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 81 F. 3d 155.

No. 95–8491. DUKES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1252.

No. 95–8493. DEYOUNG ET UX. *v.* LORENTZ, JUDGE, DISTRICT COURT OF KANSAS, 31ST DISTRICT. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 547.

No. 95–8495. HOYETT *v.* JONES, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–8496. D'AMARIO *v.* PINE, ATTORNEY GENERAL OF RHODE ISLAND. C. A. 1st Cir. Certiorari denied.

No. 95–8497. HERRERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 70 F. 3d 444.

No. 95–8506. ABLES *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 73 F. 3d 591.

No. 95–8507. FIELDS *v.* THOMPSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 1231.

No. 95–8508. HINOJOSA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 78 F. 3d 581.

No. 95–8512. IVY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 477.

No. 95–8513. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 65 F. 3d 183.

No. 95–8514. BOUNDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 480.

No. 95–8527. GREEN *v.* MORTON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 95–8529. Gallipeau *v.* Rhode Island. Sup. Ct. R. I. Certiorari denied.

No. 95–8530. Virta *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 74 F. 3d 1241.

No. 95–8531. Fauls *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 65 F. 3d 592.

No. 95–8541. Ayala-Allende *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 478.

No. 95–8542. Smith et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 78 F. 3d 580.

No. 95–8543. McIntyre *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 66 F. 3d 313.

No. 95–8544. Rangel-Ibarra *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 477.

No. 95–8548. Kissane *v.* Trippett, Warden. C. A. 6th Cir. Certiorari denied.

No. 95–8557. Simmons *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 474.

No. 95–8558. Vickaryous *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 74 F. 3d 1250.

No. 95–8561. Diaz *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 941.

No. 95–8567. James *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 74 F. 3d 1228.

No. 95–8571. Vahosky *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 76 F. 3d 381.

No. 95–8572. Silks *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1281.

No. 95–8574. Bradley *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 95–8579. McCutcheon *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1254.

No. 95–8581. FLYNN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 67 F. 3d 315.

No. 95–8582. HAIRSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 71 F. 3d 115.

No. 95–8584. COLLINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 1234.

No. 95–8587. ALLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 76 F. 3d 388.

No. 95–8593. MOORE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 95–8595. BREWER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 1234.

No. 95–8600. BARRON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 76 F. 3d 393.

No. 95–8602. ROGGY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 76 F. 3d 189.

No. 95–8604. SAULSBERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 7 F. 3d 236.

No. 95–8606. ROSS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 465.

No. 95–8609. KELLEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 221 App. Div. 2d 661, 633 N. Y. S. 2d 845.

No. 95–8610. LITTLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 113.

No. 95–8614. HICKOK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 77 F. 3d 992.

No. 95–8615. DUNN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 115.

No. 95–8619. GRANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 72 F. 3d 503.

No. 95–8621. COTO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1254.

No. 95–8626. COLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 72 F. 3d 128.

No. 95–8628. FROST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1280.

No. 95–8629. ABDUL HAKEEM *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 210 App. Div. 2d 16, 619 N. Y. S. 2d 33.

No. 95–8643. GILES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 81 F. 3d 161.

No. 95–8644. DUQUETTE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 198 Wis. 2d 386, 542 N. W. 2d 237.

No. 95–8646. YARNELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 465.

No. 95–8648. JUSTICE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 70 F. 3d 1275.

No. 95–8650. ATKINSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 464.

No. 95–879. CITY OF EDMOND ET AL. *v.* ROBINSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 68 F. 3d 1226.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

I dissent from the denial of certiorari. Petitioners identify a division between the Courts of Appeals about whether a city violates the First Amendment when its seal includes as one component a religious symbol, in particular a Latin cross. Compare 68 F. 3d 1226 (CA10 1995) and *Harris* v. *City of Zion,* 927 F. 2d 1401 (CA7 1991) (finding an Establishment Clause violation), with *Murray* v. *City of Austin,* 947 F. 2d 147 (CA5 1991) (finding no violation), cert. denied *sub nom. Derden* v. *McNeel,* 508 U. S. 960 (1992). Their petition also suggests—though it does not expressly raise—a serious question about respondents' standing to press their First Amendment claim.

The Court of Appeals observed that neither party disputed respondents' standing, but correctly observed that "[s]tanding" was always necessary. 68 F. 3d, at 1229, n. 6. Last Term, we pointed out that "[t]he question of standing is not subject to waiver: 'We are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us.'" *United States* v. *Hays*, 515 U. S. 737, 742 (1995) (quoting *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 230–231 (1990)) (citation omitted).

The Court of Appeals noted respondents had standing under its decision in *Foremaster* v. *City of St. George*, 882 F. 2d 1485, 1490 (CA10 1989), cert. denied, 495 U. S. 910 (1990). 68 F. 3d, at 1229, n. 6. In *Foremaster*, the Court of Appeals inquired whether a plaintiff challenging a city logo containing a depiction of the local Mormon temple alleged a direct injury when he alleged that he was "confronted by the logo on a daily basis." 882 F. 2d, at 1491. Reviewing our decision in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982), the court held that "an allegation of direct personal contact with the offensive action alone" alleged a direct injury, and that it was not necessary for a plaintiff to allege also that "he has altered his behavior as a consequence" of the offensive action. 882 F. 2d, at 1490.

The only factual statement as to what injury respondents in the present case might have suffered is that "[p]laintiffs are non-Christians who live or work in Edmond." 68 F. 3d, at 1228. Mere presence in the city, without further allegations as to injury, quite clearly fails to meet the standing requirements laid down in cases such as *Valley Forge*. There, we said:

> "Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . ." 454 U. S., at 485.

The *Foremaster* court acknowledged that there was disagreement among the Courts of Appeals about whether *Valley Forge* allowed standing to a plaintiff alleging direct injury by being exposed to a state symbol that offends his beliefs. 882 F. 2d, at 1490; see also *Freedom From Religion* v. *Zielke*, 845 F. 2d 1463 (CA7 1988) (finding this allegation insufficient); *Saladin* v. *City of*

Milledgeville, 812 F. 2d 687 (CA11 1987); *Hawley* v. *City of Cleveland*, 773 F. 2d 736 (CA6 1985) (finding it sufficient), cert. denied, 475 U. S. 1047 (1986). Because there are serious arguments on both sides of this question, the Courts of Appeals have divided on the issue, and the issue determines the reach of federal courts' power of judicial review of state actions, I would take this opportunity to consider it.

For these reasons, I would grant the petition for certiorari and request the parties to address the additional question whether respondents showed an injury in fact sufficient to give them standing to raise their claim of violation of the Establishment Clause of the First Amendment.

No. 95–1273. ROCKEFELLER ET AL. *v.* POWERS ET AL.; and
No. 95–1468. POWERS ET AL. *v.* ROCKEFELLER ET AL. C. A. 2d Cir. Motion of William Powers et al. to defer consideration of petitions for writs of certiorari denied. Certiorari denied. Reported below: 74 F. 3d 1367.

No. 95–1284. NORWEST CORP., FKA NORTHWEST BANCORPORATION, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 69 F. 3d 1404.

No. 95–1438. CURRY *v.* E-SYSTEMS, INC. C. A. 4th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 72 F. 3d 126.

No. 95–1407. MARYLAND *v.* GADSON. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 341 Md. 1, 668 A. 2d 22.

No. 95–1431. MIDWEST MOTOR EXPRESS, INC., ET AL. *v.* CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND. C. A. 8th Cir. Motion of Regular Common Carrier Conference for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 70 F. 3d 1014.

No. 95–1467. PILLSBURY CO., INC. *v.* PORT OF CORPUS CHRISTI AUTHORITY. C. A. 5th Cir. Motion of Port of Houston Authority for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 66 F. 3d 103.

No. 95–1556 (A–825). Califorrniaa *v.* Clinton, President of the United States. C. A. 9th Cir. Application for stay, addressed to Justice Breyer and referred to the Court, denied. Certiorari before judgment denied.

No. 95–1566. Crane Vessel Titan 5, in Rem and Its Claimant, Far Eastern Marine Exploration Drilling Co. *v.* Entron, Ltd., et al. C. A. 5th Cir. Motions of Chernomorneftegaz and Maritime Law Association of the United States for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 70 F. 3d 1269.

No. 95–7782. Lewis *v.* Federal Deposit Insurance Corporation. C. A. 8th Cir. Motion of petitioner to amend petition for writ of certiorari denied. Certiorari denied.

Rehearing Denied

No. 95–1031. Ghent *v.* Equal Employment Opportunity Commission et al., 516 U. S. 1172;

No. 95–1213. Deloatch *v.* Hughes, *ante,* p. 1120;

No. 95–1252. Mates *v.* Occupational Safety and Health Administration et al., *ante,* p. 1105;

No. 95–6375. Pourzandvakil *v.* Humphrey, Attorney General of Minnesota, et al., 516 U. S. 1051;

No. 95–7083. Blackston *v.* Reno, Attorney General of the United States, et al., 516 U. S. 1125;

No. 95–7222. Gorman *v.* McAninch, Warden, *ante,* p. 1106;

No. 95–7252. Lawson *v.* Chater, Commissioner of Social Security, *ante,* p. 1106;

No. 95–7322. Echols *v.* American Fork Investors et al., 516 U. S. 1161;

No. 95–7373. Guest *v.* Illinois, 516 U. S. 1176;

No. 95–7417. Arteaga *v.* United States Court of Appeals for the Ninth Circuit, 516 U. S. 1177;

No. 95–7464. Strowski *v.* Bank of America, *ante,* p. 1106;

No. 95–7469. Gumm *v.* Ohio, 516 U. S. 1177;

No. 95–7478. Rodriguez *v.* Wolf, Judge, District Court of Appeal of Florida, First District, et al., 516 U. S. 1178;

No. 95–7496. Covillion *v.* New Hampshire et al., 516 U. S. 1178;

No. 95–7522. Watkis *v.* West, Secretary of the Army, et al., 516 U. S. 1149;

No. 95–7538. In re Lorenz, 516 U. S. 1170;

No. 95–7564. Smiddy *v.* Singletary, Secretary, Florida Department of Corrections, *ante,* p. 1107;

No. 95–7605. Nuss *v.* Office of Personnel Management, 516 U. S. 1163;

No. 95–7638. Bennett *v.* Texas, *ante,* p. 1109;

No. 95–7658. Ramey *v.* Ashland Oil, Inc., *ante,* p. 1109;

No. 95–7712. Sherman *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, 516 U. S. 1180;

No. 95–7714. Rodriguez *v.* Florida, *ante,* p. 1123;

No. 95–7722. Johnson *v.* Welby et al., 516 U. S. 1180;

No. 95–7772. Smith *v.* Richardson, Commissioner of Internal Revenue, 516 U. S. 1180;

No. 95–7785. Jackson *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, *ante,* p. 1124;

No. 95–7789. Sudranski *v.* Brown, Secretary of Veterans Affairs, *ante,* p. 1110;

No. 95–7878. Stephens *v.* Cain, Warden, *ante,* p. 1143;

No. 95–7881. Guzman Zayas *v.* Brown, Secretary of Veterans Affairs, *ante,* p. 1124;

No. 95–7934. Wallace *v.* Smith, Warden, et al., 516 U. S. 1183;

No. 95–8120. Bergmann *v.* McCaughtry, Warden, *ante,* p. 1126; and

No. 95–8164. Tamakloe *v.* United States, *ante,* p. 1127. Petitions for rehearing denied.

No. 95–7637. McDonald *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, 516 U. S. 1179. Motion for leave to file petition for rehearing denied.

May 14, 1996

Dismissal Under Rule 46

No. 95–638. Bankers Trust Co. *v.* Procter & Gamble Co. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 61 F. 3d 465.

MAY 20, 1996

Certiorari Granted—Vacated and Remanded

No. 94–1247. HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC. *v.* PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT; NIGHTTIME CONCEPTS, INC. *v.* PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT; and HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC. *v.* PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT. Sup. Ct. Pa. Certiorari granted, judgments vacated, and case remanded for further consideration in light of *44 Liquormart, Inc.* v. *Rhode Island, ante,* p. 484. Reported below: 539 Pa. 108, 650 A. 2d 854 (first judgment); 539 Pa. 123, 650 A. 2d 861 (second judgment); 539 Pa. 125, 650 A. 2d 862 (third judgment).

No. 95–685. ANHEUSER-BUSCH, INC., ET AL. *v.* SCHMOKE, MAYOR OF BALTIMORE CITY, ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *44 Liquormart, Inc.* v. *Rhode Island, ante,* p. 484. Reported below: 63 F. 3d 1305.

No. 95–1531. ST. LEDGER ET AL. *v.* KENTUCKY REVENUE CABINET ET AL. Sup. Ct. Ky. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Fulton Corp.* v. *Faulkner,* 516 U. S. 325 (1996). Reported below: 912 S. W. 2d 34.

Miscellaneous Orders

No. A–874. TRONI ET UX. *v.* NYNEX ET AL. Bkrtcy. Ct. S. D. N. Y. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–892. IN RE TRONI ET UX. Bkrtcy. Ct. S. D. N. Y. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–1643. IN RE DISBARMENT OF STANLEY. Disbarment entered. [For earlier order herein, see 516 U. S. 1107.]

No. D–1653. IN RE DISBARMENT OF BASTINE. Disbarment entered. [For earlier order herein, see 516 U. S. 1108.]

No. D–1658. In re Disbarment of Bruckner. Disbarment entered. [For earlier order herein, see 516 U. S. 1169.]

No. D–1661. In re Disbarment of Reeves. Disbarment entered. [For earlier order herein, see 516 U. S. 1170.]

No. D–1681. In re Disbarment of Biederman. David Arnold Biederman, of Clifton, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–60. Morgan *v.* United States. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 84, Orig. United States *v.* Alaska. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, not to exceed 75 pages, may be filed within 75 days. Replies, if any, not to exceed 75 pages, may be filed within 60 days after receipt of the other party's exceptions. Surreply briefs, if any, not to exceed 30 pages, may be filed within 30 days after receipt of the other party's reply. [For earlier order herein, see, *e. g.*, 474 U. S. 1044.]

No. 95–8730. In re Greene;
No. 95–8754. In re Randall; and
No. 95–8804. In re Cayton. Petitions for writs of habeas corpus denied.

No. 95–8479. In re Tucker. Petition for writ of mandamus denied.

No. 95–8625. In re Crowder. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 95–1425. Abrams et al. *v.* Johnson et al.; and
No. 95–1460. United States *v.* Johnson et al. Appeals from D. C. S. D. Ga. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 922 F. Supp. 1556.

Certiorari Denied

No. 95–946. Baldassaro *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 64 F. 3d 206.

No. 95–1129. Red Lake Band of Chippewa Indians et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 62 F. 3d 1421.

No. 95–1145. Diaz *v.* Department of the Air Force. C. A. Fed. Cir. Certiorari denied. Reported below: 63 F. 3d 1107.

No. 95–1155. Schusterman et ux. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 63 F. 3d 986.

No. 95–1293. Target Sportswear, Inc. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 70 F. 3d 604.

No. 95–1308. V–1 Oil Co., Inc., dba V–1 Propane *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 63 F. 3d 909.

No. 95–1319. Hughes & Luce et al. *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 16.

No. 95–1400. Carter et al. *v.* Helmsley-Spear, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 71 F. 3d 77.

No. 95–1484. Amphitheater Public Schools et al. *v.* Aitken. Sup. Ct. Ariz. Certiorari denied. Reported below: 183 Ariz. 387, 904 P. 2d 456.

No. 95–1489. Goddard *v.* Kansas Director of Taxation on Assessment of Marijuana and Controlled Substances Tax. Ct. App. Kan. Certiorari denied.

No. 95–1494. Stanley *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 10 Cal. 4th 764, 897 P. 2d 481.

No. 95–1495. Berkeley *v.* Home Insurance Co. C. A. D. C. Cir. Certiorari denied. Reported below: 68 F. 3d 1409.

No. 95–1501. King *v.* Clayton County Commission et al. C. A. 11th Cir. Certiorari denied. Reported below: 66 F. 3d 342.

No. 95–1505. Bass, Surviving Spouse of Bass, Deceased, et al. *v.* National Super Markets, Inc. Sup. Ct. Mo. Certiorari denied. Reported below: 911 S. W. 2d 617.

No. 95–1507. Iadarola *v.* New York (two judgments). App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 222 App. Div. 2d 454, 634 N. Y. S. 2d 738.

No. 95–1510. Cassity, dba C & B Trucking *v.* Kentucky Transportation Cabinet. Sup. Ct. Ky. Certiorari denied. Reported below: 912 S. W. 2d 48.

No. 95–1511. Kemmerer et al. *v.* ICI Americas, Inc. C. A. 3d Cir. Certiorari denied. Reported below: 70 F. 3d 281.

No. 95–1513. Martinez *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 95–1515. Gerasolo et al. *v.* Adherence Group, Inc. C. A. 3d Cir. Certiorari denied. Reported below: 72 F. 3d 371.

No. 95–1522. De Los Santos *v.* Cambridge Tankers, Inc. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–1526. Springer *v.* City of Bend. C. A. 9th Cir. Certiorari denied. Reported below: 65 F. 3d 176.

No. 95–1527. Haney, by Next Friend, Guardian of His Property, Haney, et al. *v.* City of Cumming et al. C. A. 11th Cir. Certiorari denied. Reported below: 69 F. 3d 1098.

No. 95–1529. Voigt *v.* Savell et al. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1552.

No. 95–1535. Newton *v.* Board to Determine Fitness of Bar Applicants, Supreme Court of Georgia. Sup. Ct. Ga. Certiorari denied.

No. 95–1537. Brobston *v.* Insulation Corporation of America. C. A. 3d Cir. Certiorari denied. Reported below: 74 F. 3d 1225.

No. 95–1543. Campbell *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 95–1551. Hinchliffe et ux. *v.* Federal Home Loan Mortgage Corporation et al. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 462.

No. 95–1552. Aronson *v.* Brown, Secretary of Veterans Affairs, et al. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 677.

No. 95–1555. Connor *v.* Flynn. Sup. Ct. N. J. Certiorari denied. Reported below: 142 N. J. 440, 663 A. 2d 1350.

No. 95–1561. Kobayashi *v.* Nakamura. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–1565. Carson *v.* Waterfront Commission of New York Harbor. C. A. 3d Cir. Certiorari denied. Reported below: 73 F. 3d 24.

No. 95–1578. Kelly *v.* Penson. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 661 So. 2d 1238.

No. 95–1584. CSX Transportation, Inc. *v.* Castro. Ct. Sp. App. Md. Certiorari denied. Reported below: 106 Md. App. 770.

No. 95–1587. Moretti *v.* City of Hackensack. Super. Ct. N. J., App. Div. Certiorari denied.

No. 95–1589. Hall et ux. *v.* Indiana Department of Revenue et al. Sup. Ct. Ind. Certiorari denied. Reported below: 660 N. E. 2d 319.

No. 95–1607. Willis *v.* Georgia Department of Public Safety et al. Ct. App. Ga. Certiorari denied. Reported below: 218 Ga. App. 541, 462 S. E. 2d 386.

No. 95–1616. Eames et ux. *v.* Small Business Administration. C. A. 5th Cir. Certiorari denied. Reported below: 74 F. 3d 1236.

No. 95–1629. Clement *v.* Florida Bar. Sup. Ct. Fla. Certiorari denied. Reported below: 662 So. 2d 690.

No. 95–1657. Davis *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 60 F. 3d 1479.

No. 95–1658. Bartley *v.* Thompson, Governor of Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 198 Wis. 2d 323, 542 N. W. 2d 227.

No. 95–1664. Heller *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 27 F. 3d 559.

No. 95–1678. Schutterle *v.* United States et al. C. A. 8th Cir. Certiorari denied. Reported below: 74 F. 3d 846.

No. 95–1692. SHAW *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 465.

No. 95–1704. GRAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 95–1706. SEVER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 70 F. 3d 1258.

No. 95–1713. GAYLOR ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 74 F. 3d 214.

No. 95–1718. CLAASSEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 69 F. 3d 550.

No. 95–6304. MARSHALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 56 F. 3d 1210.

No. 95–7022. CAPERS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 61 F. 3d 1100.

No. 95–7236. LEE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 541 Pa. 260, 662 A. 2d 645.

No. 95–7952. AMEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 1273.

No. 95–7962. POPE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 58 F. 3d 1567.

No. 95–8082. CUDAL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 674.

No. 95–8138. PAJE *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 674.

No. 95–8143. SANDOVAL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 674.

No. 95–8153. BURT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 168 Ill. 2d 49, 658 N. E. 2d 375.

No. 95–8224. DE GUZMAN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 674.

No. 95–8282. Aleali *v.* Merkle, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 368.

No. 95–8283. Crawley *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 541 Pa. 408, 663 A. 2d 676.

No. 95–8297. Faunce *v.* White, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 62 F. 3d 1424.

No. 95–8302. Helms *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–8303. Derryberry *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 95–8305. Fabian *v.* Shade. Sup. Ct. Fla. Certiorari denied. Reported below: 669 So. 2d 250.

No. 95–8307. Funai *v.* Frisoli. Super. Ct. Mass., Middlesex County. Certiorari denied.

No. 95–8309. Jedrzejewski *v.* Menacker. Ct. Sp. App. Md. Certiorari denied. Reported below: 105 Md. App. 799.

No. 95–8314. Jacques *v.* Rhode Island. Sup. Ct. R. I. Certiorari denied. Reported below: 669 A. 2d 1124.

No. 95–8316. Stitt *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 95–8317. McNelton *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 111 Nev. 900, 900 P. 2d 934.

No. 95–8320. Buc-Hanan *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 95–8322. Treadway *v.* California et al. C. A. 9th Cir. Certiorari denied.

No. 95–8327. McGeshick *v.* Choucair et al. C. A. 7th Cir. Certiorari denied. Reported below: 72 F. 3d 62.

No. 95–8329. Simpson, as Next Friend to Tony L. et al. *v.* Childers et al. C. A. 6th Cir. Certiorari denied. Reported below: 71 F. 3d 1182.

No. 95–8332. Miller *v.* AmSouth Bancorporation, N. A. C. A. 11th Cir. Certiorari denied. Reported below: 71 F. 3d 882.

No. 95–8334. Shabazz *v.* Parsons et al. C. A. 10th Cir. Certiorari denied. Reported below: 73 F. 3d 374.

No. 95–8336. Vrba *v.* Milton S. Katz & Associates et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–8337. Madden *v.* Savage et al. C. A. 9th Cir. Certiorari denied.

No. 95–8338. Bruellisauer *v.* Colorado. Ct. App. Colo. Certiorari denied.

No. 95–8340. Miller *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 95–8342. Phillips *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 74 Ohio St. 3d 72, 656 N. E. 2d 643.

No. 95–8344. Britt *v.* Wells et al. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–8349. Smith *v.* Pittsburgh Police Department et al. C. A. 3d Cir. Certiorari denied.

No. 95–8351. Thornbrugh *v.* Brett, Judge, United States District Court for the Northern District of Oklahoma, et al. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 548.

No. 95–8354. Crooms *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 95–8356. Gold *v.* Morrison-Knudsen Co. et al. C. A. 2d Cir. Certiorari denied. Reported below: 68 F. 3d 1475.

No. 95–8358. Depperman *v.* Local 1199, Drug, Hospital and Health Care Employees Union, et al. C. A. 2d Cir. Certiorari denied.

No. 95–8362. Hernandez *v.* Van Oss, Judge, Superior Court of California, San Joaquin County, et al. C. A. 9th Cir. Certiorari denied.

No. 95–8379. WEBER *v.* WOOD, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 73 F. 3d 366.

No. 95–8382. TRACY *v.* CHIEF OF THE NATIONAL GUARD BUREAU ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 76 F. 3d 380.

No. 95–8385. BROOKS *v.* WICHITA FALLS STATE HOSPITAL. C. A. 5th Cir. Certiorari denied.

No. 95–8393. MILLS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 63 F. 3d 999.

No. 95–8416. NAVE *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 62 F. 3d 1024.

No. 95–8421. JACKSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 95–8435. WORNUM *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 421 Mass. 220, 656 N. E. 2d 579.

No. 95–8468. COOPER *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 38 Conn. App. 661, 664 A. 2d 773.

No. 95–8505. ABBOTT *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 136 Ore. App. 547, 901 P. 2d 268.

No. 95–8528. SLATON *v.* MILLER, SUPERINTENDENT, CORRECTIONAL INDUSTRIAL COMPLEX, PENDLETON, INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 77 F. 3d 484.

No. 95–8554. MCCLELLAND *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 95–8605. SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 75 F. 3d 603.

No. 95–8616. DELGADO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 464.

No. 95–8617. **Gonzalez** *v.* **United States.** C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 1236.

No. 95–8618. **David** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 78 F. 3d 579.

No. 95–8624. **Abdullah** *v.* **Groose, Superintendent, Jefferson City Correctional Center.** C. A. 8th Cir. Certiorari denied. Reported below: 75 F. 3d 408.

No. 95–8627. **Hope** *v.* **United States.** C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 87.

No. 95–8635. **Schwarz** *v.* **Patent and Trademark Office.** C. A. D. C. Cir. Certiorari denied. Reported below: 80 F. 3d 558.

No. 95–8661. **Howard** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 76 F. 3d 389.

No. 95–8663. **Mattos** *v.* **United States.** C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1197.

No. 95–8667. **Ciapponi** *v.* **United States.** C. A. 10th Cir. Certiorari denied. Reported below: 77 F. 3d 1247.

No. 95–8670. **Truesdale** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 78 F. 3d 580.

No. 95–8673. **Huffman** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 74 F. 3d 1247.

No. 95–8679. **Rourke** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 74 F. 3d 802.

No. 95–8683. **Burks** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Reported below: 74 F. 3d 1244.

No. 95–8684. **Chambers** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 73 F. 3d 359.

No. 95–8685. **Shaffer** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 480.

No. 95–8689. **Butterfly** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 136.

No. 95–8695. SMITH *v.* KUHLMANN, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 95–8708. MALONE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 70 F. 3d 1276.

No. 95–8715. AGUIRRE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 942.

No. 95–1244. RUVALCABA *v.* CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Motion of Police Misconduct Lawyers Referral Service for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 64 F. 3d 1323.

No. 95–1329. MOCK ET UX. *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES. Sup. Ct. Pa. Motions of Washington Legal Foundation et al. and Pacific Legal Foundation for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 542 Pa. 357, 667 A. 2d 212.

No. 95–1514. CALIFORNIA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 75 F. 3d 1350.

Rehearing Denied

No. 95–887. WAYMER *v.* UNITED STATES, *ante,* p. 1119;
No. 95–1123. GODBY *v.* ELECTROLUX CORP., *ante,* p. 1120;
No. 95–1296. TALLEY *v.* FLATHEAD VALLEY COMMUNITY COLLEGE ET AL., *ante,* p. 1121;
No. 95–7824. BANKS *v.* CALIFORNIA ET AL., *ante,* p. 1142;
No. 95–7868. BURLEY *v.* MCDONNELL DOUGLAS HELICOPTER CO., *ante,* p. 1143; and
No. 95–8003. SARTIN *v.* VIRGINIA ET AL., *ante,* p. 1125. Petitions for rehearing denied.

MAY 28, 1996

Certiorari Granted—Vacated and Remanded

No. 94–1838. OXY USA INC. *v.* CONTINENTAL TREND RESOURCES, INC., ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *BMW of North America, Inc.* v. *Gore, ante,* p. 559. Reported below: 44 F. 3d 1465.

No. 95–771. FORD MOTOR CO. *v.* SPERAU ET AL. Sup. Ct. Ala. Motion of Business Council of Alabama for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *BMW of North America, Inc.* v. *Gore, ante,* p. 559. Reported below: 674 So. 2d 24.

No. 95–1072. COMBUSTION ENGINEERING, INC. *v.* JOHANSEN ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *BMW of North America, Inc.* v. *Gore, ante,* p. 559. Reported below: 67 F. 3d 314.

No. 95–1414. APACHE CORP. *v.* MOORE ET AL. Ct. App. Tex., 7th Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *BMW of North America, Inc.* v. *Gore, ante,* p. 559. Reported below: 891 S. W. 2d 671.

No. 95–8396. PEEPLES *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bailey* v. *United States,* 516 U. S. 137 (1995). Reported below: 70 F. 3d 1275.

Miscellaneous Orders

No. D–1682. IN RE DISBARMENT OF BRAMHALL. Richard Arthur Bramhall, Jr., of York, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1683. IN RE DISBARMENT OF CLINARD. William Faulkner Clinard, of Germantown, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1684. IN RE DISBARMENT OF BLOOMFIELD. Gerald R. Bloomfield, of Albuquerque, N. M., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1685. IN RE DISBARMENT OF REILLY. Paul G. Reilly, Jr., of New York, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1686. IN RE DISBARMENT OF JONES. Lester V. Jones, of Hydes, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–63. LEVARIO *v.* STATE BAR OF TEXAS ET AL. Motion to direct the Clerk to file jurisdictional statement and for transfer denied.

No. 95–728. WARNER-JENKINSON CO., INC. *v.* HILTON DAVIS CHEMICAL CO. C. A. Fed. Cir. [Certiorari granted, 516 U. S. 1145.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted to be divided as follows: 25 minutes, petitioner; 25 minutes, respondent; 10 minutes, the Solicitor General.

No. 95–992. TURNER BROADCASTING SYSTEM, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. D. C. D. C. [Probable jurisdiction noted, 516 U. S. 1110.] Motion of the Solicitor General for divided argument granted.

No. 95–1340. HUGHES AIRCRAFT CO. *v.* UNITED STATES EX REL. SCHUMER. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 95–7894. SHIEH *v.* HATHAWAY ET AL. C. A. 9th Cir.; and
No. 95–7895. SHIEH *v.* EBERSHOFF ET AL. C. A. 9th Cir. Motions of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1132] denied.

No. 95–8836 (A–890). FELKER *v.* TURPIN, WARDEN. C. A. 11th Cir. [Certiorari granted, *ante*, p. 1182.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 95–8796. In re Sisk. Petition for writ of habeas corpus denied.

No. 95–8387. In re Spellman; and
No. 95–8453. In re James. Petitions for writs of mandamus denied.

No. 95–8448. In re Flynn; and
No. 95–8454. In re Maxwell. Petitions for writs of prohibition denied.

Certiorari Granted

No. 95–1181. Dunn et al. *v.* Commodity Futures Trading Commission et al. C. A. 2d Cir. Certiorari granted. Reported below: 58 F. 3d 50.

No. 95–1608. McKenna, Director, Ramsey County Department of Property Records and Revenue, et al. *v.* Twin Cities Area New Party. C. A. 8th Cir. Certiorari granted. Reported below: 73 F. 3d 196.

No. 95–1598. Young et al. *v.* Harper. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 64 F. 3d 563.

Certiorari Denied

No. 94–1230. Fraidin *v.* Weitzman et al. Ct. Sp. App. Md. Certiorari denied. Reported below: 99 Md. App. 747.

No. 94–1337. Liberty Mutual Insurance Co. *v.* Chemstar, Inc., et al. (three judgments). C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 429 (first judgment); 42 F. 3d 1398 (second judgment) and 1399 (third judgment).

No. 94–1890. Honda Motor Co., Ltd., et al. *v.* Oberg. Sup. Ct. Ore. Certiorari denied. Reported below: 320 Ore. 544, 888 P. 2d 8.

No. 95–433. Wolfberg et ux. *v.* Greenberg. C. A. 10th Cir. Certiorari denied. Reported below: 54 F. 3d 787.

No. 95–563. Construction and Laborers' Union Local No. 324 et al. *v.* Murray. C. A. 9th Cir. Certiorari denied. Reported below: 55 F. 3d 1445.

No. 95–1297. Pierce *v.* Iowa-Missouri Conference of Seventh-day Adventists. Sup. Ct. Iowa. Certiorari denied. Reported below: 534 N. W. 2d 425.

No. 95–1310. Israel Travel Advisory Service, Inc. *v.* Israel Identity Tours, Inc., et al. C. A. 7th Cir. Certiorari denied. Reported below: 61 F. 3d 1250.

No. 95–1330. American Steamship Co. *v.* Cleveland Tankers, Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 67 F. 3d 1200.

No. 95–1341. Robinson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 62 F. 3d 1325.

No. 95–1353. Fort Sumter Tours, Inc. *v.* Babbitt, Secretary of the Interior. C. A. 4th Cir. Certiorari denied. Reported below: 66 F. 3d 1324.

No. 95–1359. Maryboy *v.* Utah State Tax Commission et al. Sup. Ct. Utah. Certiorari denied. Reported below: 904 P. 2d 662.

No. 95–1363. Mosier, Trustee *v.* Kroger Co. C. A. 9th Cir. Certiorari denied. Reported below: 65 F. 3d 778.

No. 95–1417. Kane et vir *v.* Magna Mixer Co. et al.; and
No. 95–1610. Magna Mixer Co. et al. *v.* Kane et vir. C. A. 6th Cir. Certiorari denied. Reported below: 71 F. 3d 555.

No. 95–1420. Philip Morris Inc. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Reported below: 71 F. 3d 1040.

No. 95–1448. Nernberg *v.* Ludmer. Super. Ct. Pa. Certiorari denied. Reported below: 433 Pa. Super. 316, 640 A. 2d 939.

No. 95–1477. Schulte et al. *v.* Smith, Administrator of the Estate of Smith, Deceased. Sup. Ct. Ala. Certiorari denied. Reported below: 671 So. 2d 1334.

No. 95–1517. Indiana Department of Correction *v.* Sampley et al. C. A. 7th Cir. Certiorari denied. Reported below: 72 F. 3d 528.

No. 95–1525. Foster, Sheriff, Newberry County, et al. *v.* Gilliam. C. A. 4th Cir. Certiorari denied. Reported below: 75 F. 3d 881.

No. 95–1530. GLAVEY *v.* DIME SAVINGS BANK OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 214 App. Div. 2d 419, 625 N. Y. S. 2d 181.

No. 95–1532. LINDENMEIER ET AL. *v.* SIEMENS POWER CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 544.

No. 95–1533. MOOSE LODGE #259 (SALT LAKE CITY) ET AL. *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL. Sup. Ct. Utah. Certiorari denied. Reported below: 905 P. 2d 1189.

No. 95–1539. KITTLER ET UX. *v.* ECKBERG, LAMMERS, BRIGGS, WOLFF & VIERLING ET AL. Ct. App. Minn. Certiorari denied. Reported below: 535 N. W. 2d 653.

No. 95–1540. HOKE ET AL. *v.* BLUDWORTH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 878 and 82 F. 3d 413.

No. 95–1542. COOPER ET AL. *v.* MASSACHUSETTS COMMISSIONER OF REVENUE. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 421 Mass. 557, 658 N. E. 2d 963.

No. 95–1544. BURKHART ET UX. *v.* AGOSTINI. Sup. Ct. Del. Certiorari denied. Reported below: 670 A. 2d 1336.

No. 95–1547. AMERICAN PREMIER UNDERWRITERS, INC. *v.* USX CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 71 F. 3d 1113.

No. 95–1554. BATTS *v.* TOW-MOTOR FORKLIFT CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 66 F. 3d 743.

No. 95–1559. HICKAM *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 235 Conn. 614, 668 A. 2d 1321.

No. 95–1560. CROW TRIBE OF INDIANS ET AL. *v.* REPSIS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 73 F. 3d 982.

No. 95–1568. VENEMAN, SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL. *v.* PACIFIC MERCHANT SHIPPING ASSN. Sup. Ct. Cal. Certiorari denied. Reported below: 12 Cal. 4th 503, 907 P. 2d 430.

No. 95–1574. ALTON & SOUTHERN RAILWAY CO. *v.* EDWARDS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 275 Ill. App. 3d 529, 656 N. E. 2d 208.

No. 95–1583. GREEN ET AL. *v.* PENNSYLVANIA MUNICIPAL SERVICE CO. ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 661 A. 2d 44.

No. 95–1586. BROWN *v.* CAMPBELL COUNTY BOARD OF EDUCATION ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 915 S. W. 2d 407.

No. 95–1590. GONZALEZ ET AL. *v.* MOISES LUNA AND ASSOCIATES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–1591. NEUFELD *v.* CITY OF BALTIMORE, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1262.

No. 95–1611. R. J. REYNOLDS TOBACCO CO. ET AL. *v.* MINNESOTA ET AL. Ct. App. Minn. Certiorari denied.

No. 95–1615. TAMBURELLO *v.* COMM-TRACT CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 67 F. 3d 973.

No. 95–1626. AMERICANOS *v.* CARTER, ATTORNEY GENERAL OF INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 74 F. 3d 138.

No. 95–1656. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 121.

No. 95–1661. ROBERT ET AL. *v.* PHILADELPHIA PARK ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 542 Pa. 355, 667 A. 2d 211.

No. 95–1673. SPENCER *v.* SPENCER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 68 F. 3d 479.

No. 95–1716. GREAT FALLS EYE SURGERY CENTER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 75 F. 3d 470.

No. 95–1740. KOTSIAS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 274 Ill. App. 3d 1107, 691 N. E. 2d 1198.

No. 95–1772. MUSSER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 62 F. 3d 1425.

No. 95–1776. MCNEEL ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE; KURNIK ET UX. *v.* COMMISSIONER OF INTERNAL REVEnue; and Pressley *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 76 F. 3d 387 (first judgment); 70 F. 3d 120 (second judgment) and 1279 (third judgment).

No. 95–7660. Rosario *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 66 F. 3d 321.

No. 95–7765. Antonelli *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 72 F. 3d 132.

No. 95–7854. Juarez *v.* Lee et al. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 548.

No. 95–8041. Palmisano *v.* Executive Committee, United States District Court for the Northern District of Illinois; and Palmisano *v.* Bilandic, Chief Justice, Supreme Court of Illinois, et al. C. A. 7th Cir. Certiorari denied. Reported below: 70 F. 3d 483 (first judgment); 73 F. 3d 364 (second judgment).

No. 95–8092. Sever *v.* Bell Communications Research, aka Bellcore. C. A. 3d Cir. Certiorari denied. Reported below: 60 F. 3d 817.

No. 95–8167. Hope *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 168 Ill. 2d 1, 658 N. E. 2d 391.

No. 95–8365. Hernandez *v.* Starbuck, Superintendent, Wyoming Honor Farm, et al. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 1089.

No. 95–8373. Spychala *v.* Lewis, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 76 F. 3d 388.

No. 95–8375. Sanborn *v.* Kentucky. Sup. Ct. Ky. Certiorari denied.

No. 95–8376. Rodenbaugh *v.* Leary. C. A. 3d Cir. Certiorari denied.

No. 95–8377. Prieto *v.* Crawford et al. C. A. 11th Cir. Certiorari denied.

No. 95–8386. Strickland *v.* Crowe et al. C. A. 11th Cir. Certiorari denied. Reported below: 69 F. 3d 550.

No. 95–8388. SLADE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 95–8390. CHAMBERLIN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–8408. DALE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–8409. DYMITS *v.* CENTER FOR INDEPENDENCE OF THE DISABLED ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–8410. FRANCIS *v.* DEPARTMENT OF COMMERCE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 477.

No. 95–8412. ADAMS *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 95–8414. POPKE ET AL. *v.* OHIO DEPARTMENT OF REHABILITATION AND CORRECTION ET AL. C. A. 6th Cir. Certiorari denied.

No. 95–8417. MCQUEEN *v.* MATA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 876.

No. 95–8418. MCQUEEN *v.* TURNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 876.

No. 95–8420. MOOMCHI *v.* UNIVERSITY OF NEW MEXICO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 72 F. 3d 138.

No. 95–8423. JOHNSON *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 462.

No. 95–8425. JANNEH *v.* THE REGENCY ET AL. C. A. 2d Cir. Certiorari denied.

No. 95–8426. LOCKE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 74 F. 3d 1237.

No. 95–8427. JOHNSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 95–8429. Stearns-Miller *v.* Ault et al. C. A. 11th Cir. Certiorari denied.

No. 95–8430. Stearns-Miller *v.* Brown et al. C. A. 11th Cir. Certiorari denied.

No. 95–8433. Artis *v.* Garraghty, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1260.

No. 95–8436. Hentz *v.* Roberts, Superintendent, Mississippi State Penitentiary. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 1169.

No. 95–8443. Carter *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 342 N. C. 312, 464 S. E. 2d 272.

No. 95–8445. Roussos *v.* Baxley. Ct. Sp. App. Md. Certiorari denied. Reported below: 103 Md. App. 781.

No. 95–8446. Roussos *v.* Felter. Cir. Ct. Montgomery County, Md. Certiorari denied.

No. 95–8449. Flynn *v.* City of Garden City et al. C. A. 6th Cir. Certiorari denied. Reported below: 95 F. 3d 1152.

No. 95–8450. Harvell *v.* Nagle, Warden, et al. C. A. 11th Cir. Certiorari denied. Reported below: 58 F. 3d 1541.

No. 95–8452. Bal *v.* City of New York et al. C. A. 2d Cir. Certiorari denied. Reported below: 99 F. 3d 402.

No. 95–8455. Nava *v.* United States Soccer Federation. Sup. Ct. Fla. Certiorari denied. Reported below: 662 So. 2d 932.

No. 95–8457. Mattison *v.* Roach et al. C. A. 6th Cir. Certiorari denied.

No. 95–8459. Riggins *v.* Kasenow et al. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 1273.

No. 95–8461. Misch *v.* Washington. Sup. Ct. Wash. Certiorari denied. Reported below: 127 Wash. 2d 1024, 904 P. 2d 1157.

No. 95–8474. Levine *v.* United States et al. C. A. Fed. Cir. Certiorari denied. Reported below: 74 F. 3d 1260.

No. 95–8484. JIM W. *v.* MARGENE L. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–8516. KLEINSCHMIDT *v.* DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 663 So. 2d 630.

No. 95–8522. ALVAREZ *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 672.

No. 95–8523. DUKES *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 68 F. 3d 460.

No. 95–8526. HAMMOND *v.* LINDLER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 1231.

No. 95–8532. SCHWARZ *v.* UNITED STATES FIDELITY & GUARANTY CO. ET AL. Sup. Ct. Utah. Certiorari denied.

No. 95–8547. MARSH *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 77 F. 3d 469.

No. 95–8549. BOWEN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 322 Ark. 483, 911 S. W. 2d 555.

No. 95–8564. HASA *v.* NEVADA ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–8586. MCLAUGHLIN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied.

No. 95–8590. BARBEE *v.* PENNSYLVANIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 461.

No. 95–8597. SCOTT *v.* MOYER, CHIEF JUSTICE, SUPREME COURT OF OHIO, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 74 Ohio St. 3d 1509, 659 N. E. 2d 1286.

No. 95–8603. PRIVETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 68 F. 3d 101.

No. 95–8639. HUNTER *v.* BOYD ET AL. C. A. 8th Cir. Certiorari denied.

No. 95–8642. PRINGLE *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 82 F. 3d 406.

No. 95–8649. AYARS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 95–8657. DAVIS *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 74 F. 3d 1248.

No. 95–8669. CURLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 74 F. 3d 1246.

No. 95–8688. HARRIS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 81 F. 3d 535.

No. 95–8690. TILLI *v.* VAN ANTWERPEN, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 95–8700. DANGER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 68 F. 3d 485.

No. 95–8701. HAYNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 877.

No. 95–8711. LAPIERRE *v.* KINCHELOE, SUPERINTENDENT, SPRING CREEK CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 74 F. 3d 1246.

No. 95–8731. BRANCH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 72 F. 3d 140.

No. 95–8733. HUTCHING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 95–8737. SHAVERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 465.

No. 95–8738. ARIAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 74 F. 3d 1241.

No. 95–8739. CASTORENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 1150.

No. 95–8740. CORCORAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 944.

No. 95–8741. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 74 F. 3d 1229.

No. 95–8751. NOCK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 465.

No. 95–8752. JENNINGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 72 F. 3d 887.

No. 95–8753. MEDLOCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 77 F. 3d 497.

No. 95–8755. SANTANA-CASTELLANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 74 F. 3d 593.

No. 95–8761. LOWE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 76 F. 3d 389.

No. 95–8764. HUDSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 F. 3d 635.

No. 95–8765. DOLLOPH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 75 F. 3d 35.

No. 95–8766. AKERE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 81 F. 3d 151.

No. 95–8769. CAMPBELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 477.

No. 95–8776. REESE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 67 F. 3d 902.

No. 95–8777. ELLIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 76 F. 3d 389.

No. 95–8786. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 69 F. 3d 1109.

No. 95–8788. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 73 F. 3d 666.

No. 95–8792. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 74 F. 3d 575.

No. 95–8794. Thomas *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 76 F. 3d 394.

No. 95–8800. Burnette *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 76 F. 3d 376.

No. 95–8801. Banks *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 76 F. 3d 389.

No. 95–8805. Small *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 74 F. 3d 1276.

No. 95–8806. Apa *v.* Sweeney, New York Commissioner of Labor. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 220 App. Div. 2d 916, 632 N. Y. S. 2d 326.

No. 95–8808. Gooden *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 79 F. 3d 1139.

No. 95–8815. Nelson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 77 F. 3d 497.

No. 95–8820. Chara *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 943.

No. 95–8821. Abbas *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 506.

No. 95–8822. Asrar *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 309.

No. 95–8823. Clements *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 51 F. 3d 273.

No. 95–8828. Nelson *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 465.

No. 95–8839. Jackson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 76 F. 3d 376.

No. 95–1516. Ford Motor Co. *v.* Fulkerson et al. Ct. App. Ky. Motion of Product Liability Advisory Council, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 95–1576. Borawick *v.* Shay et ux. C. A. 2d Cir. Motion of American Coalition for Abuse Awareness et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 68 F. 3d 597.

Rehearing Denied

No. 90–5549. VOTTELER *v.* UNITED STATES, 498 U. S. 1000;

No. 95–508. KEARNS *v.* CHRYSLER CORP. ET AL., 516 U. S. 989;

No. 95–1276. ZOLT ET AL. *v.* BINGHAM, ANCILLARY ADMINISTRATOR OF THE ESTATE OF MARLEY, ET AL., *ante,* p. 1134;

No. 95–6847. NADAL *v.* UNITED STATES, 516 U. S. 1122;

No. 95–7569. VARGAS *v.* GUNN, WARDEN, *ante,* p. 1107;

No. 95–7600. KOWALSKI *v.* OREGON STATE BAR ET AL., *ante,* p. 1108;

No. 95–7751. BERGMANN *v.* MCCOLLOUGH, *ante,* p. 1141;

No. 95–7856. MISEK-FALKOFF *v.* INTERNATIONAL BUSINESS MACHINES CORP., *ante,* p. 1111;

No. 95–7861. IN RE ROY, *ante,* p. 1132;

No. 95–7885. ESTES *v.* NAMBA ET AL., *ante,* p. 1144;

No. 95–7900. IN RE ROBINSON, 516 U. S. 1170;

No. 95–7940. ROBINSON *v.* MELOY, SUPERINTENDENT, ROCKVILLE TRAINING CENTER, *ante,* p. 1158;

No. 95–7956. YATES *v.* GODWIN, *ante,* p. 1159;

No. 95–8048. AKECH *v.* UNITED STATES, *ante,* p. 1125;

No. 95–8064. AGUILAR *v.* NEWTON, WARDEN, ET AL., *ante,* p. 1145; and

No. 95–8200. GARNER *v.* OHIO, *ante,* p. 1147. Petitions for rehearing denied.

JUNE 3, 1996

Dismissal Under Rule 46

No. 95–1321. TALBOTT, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF BEAVERS, ET AL. *v.* C. R. BARD, INC., ET AL. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 63 F. 3d 25.

Certiorari Granted—Vacated and Remanded

No. 95–740. UNION SECURITY LIFE INSURANCE CO. *v.* CROCKER. Sup. Ct. Ala. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *BMW of North America, Inc.* v. *Gore, ante,* p. 559. Reported below: 667 So. 2d 688.

No. 95–1325. AMERICAN PIONEER LIFE INSURANCE CO. ET AL. *v.* WILLIAMSON. Sup. Ct. Ala. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *BMW of North America, Inc.* v. *Gore, ante,* p. 559. Reported below: 681 So. 2d 1040.

No. 95–1491. UNITED STATES *v.* D. F. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ornelas* v. *United States, ante,* p. 690. Reported below: 63 F. 3d 671.

No. 95–5845. BALDWIN *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ornelas* v. *United States, ante,* p. 690. Reported below: 60 F. 3d 363.

Miscellaneous Orders

No. D–1662. IN RE DISBARMENT OF BRINKLEY. Disbarment entered. [For earlier order herein, see *ante,* p. 1117.]

No. D–1663. IN RE DISBARMENT OF SEIKEL. Disbarment entered. [For earlier order herein, see *ante,* p. 1117.]

No. D–1664. IN RE DISBARMENT OF SEAMAN. Disbarment entered. [For earlier order herein, see *ante,* p. 1117.]

No. D–1665. IN RE DISBARMENT OF MICCI. Disbarment entered. [For earlier order herein, see *ante,* p. 1117.]

No. D–1666. IN RE DISBARMENT OF O'KICKI. Disbarment entered. [For earlier order herein, see *ante,* p. 1117.]

No. D–1687. IN RE DISBARMENT OF GOTTFRIED. Lawrence Robert Gottfried, of Silver Spring, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–64. PETERSEN *v.* GOVERNMENT OF THE VIRGIN ISLANDS; and

No. M–66. CALIENDO *v.* RODRIGUEZ, SUPERINTENDENT OF POLICE OF CHICAGO, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for award of fees and expenses granted, and the River Master is awarded a total of $2,632 for the period January 1 through March 31, 1996, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 516 U. S. 803.]

No. 95–1594. DE BUONO, NEW YORK COMMISSIONER OF HEALTH, ET AL. *v.* NYSA–ILA MEDICAL AND CLINICAL SERVICES FUND, BY ITS TRUSTEES, BOWERS ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 95–8919. IN RE LORENZ. Petition for writ of habeas corpus denied.

No. 95–1684. IN RE MELKA MARINE, INC.;
No. 95–1687. IN RE MITRANO; and
No. 95–8500. IN RE DIAS. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 95–1455. RENO, ATTORNEY GENERAL *v.* BOSSIER PARISH SCHOOL BOARD ET AL.; and
No. 95–1508. PRICE ET AL. *v.* BOSSIER PARISH SCHOOL BOARD ET AL. Appeals from D. C. D. C. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 907 F. Supp. 434.

Certiorari Granted

No. 95–1595. BABBITT, SECRETARY OF THE INTERIOR, ET AL. *v.* YOUPEE ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 67 F. 3d 194.

No. 95–1184. GLICKMAN, SECRETARY OF AGRICULTURE *v.* WILEMAN BROTHERS & ELLIOTT, INC., ET AL. C. A. 9th Cir. Motions of American Mushroom Institute et al. and National Association of State Departments of Agriculture for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 58 F. 3d 1367.

No. 95–1225. UNITED STATES *v.* BROCKAMP, ADMINISTRATOR OF THE ESTATE OF MCGILL, DECEASED; and UNITED STATES *v.* SCOTT. C. A. 9th Cir. Motion of Vincent Tassinari for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 67 F. 3d 260 (first judgment); 70 F. 3d 120 (second judgment).

Certiorari Denied

No. 95–1101. Wilson *v.* Washington. Super. Ct. Wash., King County. Certiorari denied.

No. 95–1286. Bakker et al. *v.* Federal Deposit Insurance Co., Receiver for Hansen Savings Bank, SLA. C. A. 11th Cir. Certiorari denied. Reported below: 51 F. 3d 242.

No. 95–1328. First National Bank & Trust, Wibaux, Montana, et al. *v.* Comptroller of the Currency. C. A. 9th Cir. Certiorari denied. Reported below: 63 F. 3d 894.

No. 95–1349. Morales *v.* Industrial Commission of Arizona et al. Ct. App. Ariz. Certiorari denied.

No. 95–1351. Blytheville School District No. 5 et al. *v.* Harvell et al. C. A. 8th Cir. Certiorari denied. Reported below: 71 F. 3d 1382.

No. 95–1393. Wileman Brothers & Elliott, Inc., et al. *v.* Glickman, Secretary of Agriculture. C. A. 9th Cir. Certiorari denied. Reported below: 58 F. 3d 1367.

No. 95–1395. Central States, Southeast and Southwest Areas Health and Welfare Fund et al. *v.* Pathology Laboratories of Arkansas. C. A. 7th Cir. Certiorari denied. Reported below: 71 F. 3d 1251.

No. 95–1406. Baker et al. *v.* Hadley, Columbiana County Auditor. C. A. 6th Cir. Certiorari denied. Reported below: 72 F. 3d 129.

No. 95–1413. Bieri et vir *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 68 F. 3d 232.

No. 95–1427. Rye Psychiatric Hospital Center, Inc. *v.* Surles, New York Commissioner of Mental Health, et al. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 218 App. Div. 2d 853, 630 N. Y. S. 2d 593.

No. 95–1445. United States ex rel. Fine *v.* Chevron U. S. A. Inc. et al. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 740.

No. 95–1475. WINSTON & STRAWN *v.* HYATT REGENCY PHOENIX HOTEL CO. ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 184 Ariz. 120, 907 P. 2d 506.

No. 95–1482. MATA *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 513.

No. 95–1585. COLVARD *v.* FULTON-DEKALB HOSPITAL AUTHORITY. C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1252.

No. 95–1602. IDAHO *v.* STUART. Sup. Ct. Idaho. Certiorari denied. Reported below: 127 Idaho 806, 907 P. 2d 783.

No. 95–1638. LIBMAN CO. *v.* VINING INDUSTRIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 69 F. 3d 1360.

No. 95–1640. ANDERSON *v.* SHARMA ET AL. (two judgments). Sup. Ct. Va. Certiorari denied.

No. 95–1668. MOORE *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569 ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–1689. BASS *v.* NEVADA BOARD OF MEDICAL EXAMINERS ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 111 Nev. 1734, 916 P. 2d 217.

No. 95–1715. BRASSEUR *v.* EMPIRE TRAVEL SERVICE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 135.

No. 95–1722. RIOS *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–1724. JACOB *v.* METROLASER, INC., ET AL. Ct. App. N. M. Certiorari denied.

No. 95–1754. BAILEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 136.

No. 95–1775. PAGAN-SAN-MIGUEL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 63 F. 3d 1142.

No. 95–1778. McMillan *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 95–1783. Pruitt et al. *v.* Howard County Sheriff's Department et al. C. A. 4th Cir. Certiorari denied. Reported below: 76 F. 3d 374.

No. 95–1791. Missouri Pacific Railroad Co. *v.* Shepherd. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 276 Ill. App. 3d 1148, 697 N. E. 2d 27.

No. 95–1795. Lane *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari denied. Reported below: 70 F. 3d 1276.

No. 95–1798. Martorano *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 465.

No. 95–1818. Matthews *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 72 F. 3d 130.

No. 95–7946. Pulido *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 125.

No. 95–8052. Hill *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 542 Pa. 291, 666 A. 2d 642.

No. 95–8115. Worthey *v.* Collins, Warden. C. A. 6th Cir. Certiorari denied.

No. 95–8137. Nguyen Huu To *v.* Rubin, Secretary of the Treasury. C. A. 2d Cir. Certiorari denied. Reported below: 99 F. 3d 400.

No. 95–8353. Barcher *v.* Shipman. Sup. Ct. Del. Certiorari denied. Reported below: 676 A. 2d 900.

No. 95–8361. Hatch *v.* Oklahoma. C. A. 10th Cir. Certiorari denied. Reported below: 58 F. 3d 1447.

No. 95–8397. Rogers *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 340.

No. 95–8413. Battle *v.* Bowersox, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 64 F. 3d 347.

No. 95–8462. SMART *v.* PURNELL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 73 F. 3d 364.

No. 95–8472. COTTON *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–8481. SHABAZZ *v.* UNKNOWN NAMED HEADS OF CLANDESTINE SECRET BODIES OF THE LEXINGTON, OKLAHOMA, CORRECTIONAL CENTER MAIL ROOM AND LITERARY REVIEW COMMITTEE MEMBERS ET AL. (two judgments). Sup. Ct. Okla. Certiorari denied.

No. 95–8482. ROSS *v.* NELTHROPP. Super. Ct. Pa. Certiorari denied. Reported below: 446 Pa. Super. 691, 667 A. 2d 430.

No. 95–8492. FRASER DEEBLE *v.* DYSLIN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 70 F. 3d 1282.

No. 95–8494. DEYOUNG *v.* KANSAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 547.

No. 95–8499. DYMITS *v.* GRIM. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–8501. BOYD *v.* MISSISSIPPI (two judgments). Sup. Ct. Miss. Certiorari denied. Reported below: 667 So. 2d 1312.

No. 95–8504. CURRENT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 95–8510. JOHNSON *v.* AARON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 78 F. 3d 581.

No. 95–8515. MAYDAK *v.* WENER ET AL. C. A. 3d Cir. Certiorari denied.

No. 95–8517. MORRIS *v.* HOUSING AUTHORITY OF KANSAS CITY ET AL. C. A. 8th Cir. Certiorari denied.

No. 95–8518. STANISLAW *v.* NAVAJO COUNTY BOARD OF SUPERVISORS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1280.

No. 95–8519. TAYLOR *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 95–8521. LEWIS *v.* CENTURY MORTGAGE CO. ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 95–8524. DAVIS *v.* THOMPSON, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 306.

No. 95–8525. GARCIA *v.* RIVERDALE PLATING & HEAT TREATING CO. C. A. 7th Cir. Certiorari denied. Reported below: 48 F. 3d 1221.

No. 95–8533. DEDES *v.* PAGE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 72 F. 3d 126.

No. 95–8535. MUKHERJEE *v.* SHERATON-PALACE HOTEL. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1143.

No. 95–8538. BARKETT *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 666 So. 2d 902.

No. 95–8539. PEARSON *v.* PADOVANO, CHIEF JUDGE, CIRCUIT COURT OF FLORIDA, LEON COUNTY. Sup. Ct. Fla. Certiorari denied. Reported below: 673 So. 2d 29.

No. 95–8559. WRIGHT *v.* REICH, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 70 F. 3d 1259.

No. 95–8573. REYNOLDS *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 164 Vt. 651, 677 A. 2d 429.

No. 95–8578. MANGRUM *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY. C. A. 11th Cir. Certiorari denied. Reported below: 77 F. 3d 496.

No. 95–8594. BLASSINGAME *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 73 F. 3d 379.

No. 95–8632. OSBORNE ET AL. *v.* FIRST FEDERAL SAVINGS BANK. Sup. Ct. Del. Certiorari denied. Reported below: 670 A. 2d 1337.

No. 95–8655. BRUNSTON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 81 F. 3d 155.

No. 95–8658. GEERY *v.* SHELLEY SCHOOL DISTRICT. Sup. Ct. Idaho. Certiorari denied.

No. 95–8666. BIES *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 74 Ohio St. 3d 320, 658 N. E. 2d 754.

No. 95–8680. PARKHURST ET AL. *v.* SHILLINGER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 72 F. 3d 138.

No. 95–8687. SANTIAGO *v.* SNYDER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 95–8721. SNURKOWSKI *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 112.

No. 95–8747. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 59 F. 3d 168.

No. 95–8759. OLLIE *v.* KUHN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 79 F. 3d 1138.

No. 95–8762. ISAAC *v.* TAYLOR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 1232.

No. 95–8770. CHILLI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 77 F. 3d 497.

No. 95–8773. SALDAMARCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 465.

No. 95–8774. OLEKA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 79 F. 3d 1140.

No. 95–8775. PADGETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 78 F. 3d 580.

No. 95–8798. STANCIL *v.* MOO & OINK, INC. C. A. 7th Cir. Certiorari denied. Reported below: 76 F. 3d 381.

No. 95–8802. SANDERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 76 F. 3d 376.

No. 95–8810. HYDE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 76 F. 3d 389.

No. 95–8832. BENNETT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 464.

No. 95–8834. COOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 78 F. 3d 585.

No. 95–8840. Mason *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 74 F. 3d 890.

No. 95–8843. Idowu *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 74 F. 3d 387.

No. 95–8850. Williams *v.* Abbey Medical, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 79 F. 3d 1144.

No. 95–8851. Crispin *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 95–8853. Dorsey *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 77 F. 3d 490.

No. 95–8854. Garcia *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 78 F. 3d 1457.

No. 95–8855. Shelton *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 81 F. 3d 157.

No. 95–8858. Price *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 75 F. 3d 1440.

No. 95–8860. Watson *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 76 F. 3d 4.

No. 95–8872. Love *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 116.

No. 95–8876. Breath *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 76 F. 3d 393.

No. 95–8878. Rogers *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 73 F. 3d 774.

No. 95–8880. Bailey *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 76 F. 3d 320.

No. 95–8882. Andrews *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 75 F. 3d 552.

No. 95–8890. Williams *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 56 F. 3d 74.

No. 95–8891. Han *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 537.

No. 95–8899. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 95–1230. BELLSOUTH TELECOMMUNICATIONS, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 59 F. 3d 1407.

No. 95–1581. HURINENKO ET AL. *v.* CHEVRON U. S. A. INC. ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 69 F. 3d 283.

No. 95–1593. BOURNE, DBA BOURNE CO. *v.* WALT DISNEY CO. ET AL. C. A. 2d Cir. Motions of National Music Publishers' Association, Inc., and Karen Adams et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 68 F. 3d 621.

Rehearing Denied

No. 95–1245. STEINBERG *v.* BINGHAM, ANCILLARY ADMINISTRATOR OF THE ESTATE OF MARLEY, ET AL., *ante,* p. 1134;

No. 95–1256. DOLENZ *v.* SOUTHWEST MEDIA CORP. ET AL., *ante,* p. 1134;

No. 95–1261. GREEN *v.* UNITED PENTECOSTAL CHURCH INTERNATIONAL, *ante,* p. 1134;

No. 95–1277. LITZ *v.* THOMAS, *ante,* p. 1135;

No. 95–1314. CLEMENTS *v.* BABCOCK & WILCOX CO. ET AL., *ante,* p. 1136;

No. 95–7216. GREEN *v.* 25TH JUDICIAL DISTRICT PROBATION DEPARTMENT, 516 U. S. 1130;

No. 95–7594. MCCARTHY *v.* KANSAS CITY, MISSOURI, *ante,* p. 1108;

No. 95–7698. PAGE ET AL. *v.* TEXAS BOARD OF PARDONS AND PAROLE ET AL., *ante,* p. 1123;

No. 95–8024. BERGMANN *v.* MCCAUGHTRY, WARDEN, *ante,* p. 1160; and

No. 95–8242. CRABTREE *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante,* p. 1161. Petitions for rehearing denied.

JUNE 7, 1996

Miscellaneous Order

No. A–982 (95–1425). ABRAMS ET AL. *v.* JOHNSON ET AL. D. C. S. D. Ga. [Probable jurisdiction noted, *ante,* p. 1207.] Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JUNE 10, 1996

Affirmed on Appeal

No. 95–1623. MOORE, ATTORNEY GENERAL OF MISSISSIPPI, ET AL. *v.* DUPREE ET AL.; and

No. 95–1624. LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES ET AL. *v.* DUPREE ET AL. Affirmed on appeals from D. C. S. D. Miss.

Certiorari Granted—Vacated and Remanded

No. 95–963. GREENWOOD TRUST CO. *v.* HUNTER. Sup. Ct. N. J. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Smiley* v. *Citibank (South Dakota), N. A., ante,* p. 735. Reported below: 143 N. J. 97, 668 A. 2d 1067.

No. 95–991. CITIBANK (SOUTH DAKOTA), N. A. *v.* SHERMAN. Sup. Ct. N. J. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Smiley* v. *Citibank (South Dakota), N. A., ante,* p. 735. Reported below: 143 N. J. 35, 668 A. 2d 1036.

No. 95–1251. WARMUS *v.* MELAHN ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Quackenbush* v. *Allstate Ins. Co., ante,* p. 706. Reported below: 62 F. 3d 252.

Miscellaneous Orders

No. A–974. WASHINGTON ET AL. *v.* GLUCKSBERG ET AL. Application for stay of issuance of mandate of the United States Court of Appeals for the Ninth Circuit, case No. 94–35534, issued on May 29, 1996, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

No. D–1688. IN RE DISBARMENT OF GARRIGAN. Daniel P. Garrigan, of Dallas, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1689. IN RE DISBARMENT OF TAYLOR. Joe Edward Taylor, of Dallas, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1690. IN RE DISBARMENT OF WEINIG. Harvey Weinig, of New York, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–67. POZSGAY *v.* POZSGAY; and

No. M–69. COLON *v.* FLORIDA COMMISSION ON ETHICS. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 120, Orig. NEW JERSEY *v.* NEW YORK. Motion of the Special Master for award of fees and expenses granted, and the Special Master is awarded a total of $144,837.50 for the period November 18, 1995, through May 15, 1996, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 516 U. S. 1026.]

No. 95–891. OHIO *v.* ROBINETTE. Sup. Ct. Ohio. [Certiorari granted, 516 U. S. 1157.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 95–974. ARIZONANS FOR OFFICIAL ENGLISH ET AL. *v.* ARIZONA ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1102.] Motion of U. S. English, Inc., for leave to file a brief as *amicus curiae* granted.

No. 95–1065. SCHENCK ET AL. *v.* PRO-CHOICE NETWORK OF WESTERN NEW YORK ET AL. C. A. 2d Cir. [Certiorari granted, 516 U. S. 1170.] Motion of Legal Defense for Unborn Children for leave to file a brief as *amicus curiae* denied. Motion of Alan Ernest for leave to represent children unborn and born alive denied.

No. 95–1081. INGALLS SHIPBUILDING, INC., ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1186.] Motion of the parties to dispense with printing the joint appendix granted.

Certiorari Denied

No. 94–1476. OWENS-CORNING FIBERGLAS CORP. *v.* PICKERING, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF PICKERING, DECEASED, ET AL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 265 Ill. App. 3d 806, 638 N. E. 2d 1127.

No. 95–800. OWENS-CORNING FIBERGLAS CORP. *v.* BRENNAN. C. A. 9th Cir. Certiorari denied. Reported below: 61 F. 3d 910.

No. 95–818. OWENS-CORNING FIBERGLAS CORP. *v.* REKDAHL ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–951. HARRIS *v.* CHASE MANHATTAN BANK, N. A., ET AL. Sup. Ct. Cal. Certiorari denied.

No. 95–1056. COPELAND *v.* MBNA AMERICA BANK, N. A. Sup. Ct. Colo. Certiorari denied. Reported below: 907 P. 2d 87.

No. 95–1257. FALLINI ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 56 F. 3d 1378.

No. 95–1318. PITTMAN ET AL. *v.* CHICAGO BOARD OF EDUCATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 64 F. 3d 1098.

No. 95–1348. LOWENSCHUSS *v.* RESORTS INTERNATIONAL, INC. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 1394.

No. 95–1355. CHAPLIN *v.* UNITED STATES;
No. 95–8134. RATLIFF *v.* UNITED STATES; and
No. 95–8147. LAWRENCE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 69 F. 3d 419.

No. 95–1440. PRESIDENT CONTAINER, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 74 F. 3d 1227.

No. 95–1444. CAHILL *v.* DEPARTMENT OF LABOR ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 63 F. 3d 1111.

No. 95–1449. OWENS-CORNING FIBERGLAS CORP. *v.* DUDLEY ET UX. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 667 So. 2d 783.

No. 95–1450. CAMP, ADMINISTRATOR OF THE ESTATE OF YOUNG, DECEASED *v.* GREGORY; and
No. 95–1669. GREGORY *v.* CAMP, ADMINISTRATOR OF THE ESTATE OF YOUNG, DECEASED. C. A. 7th Cir. Certiorari denied. Reported below: 67 F. 3d 1286.

No. 95–1493. RICHARDSON *v.* CITIBANK (SOUTH DAKOTA), N. A.; and
No. 95–1500. STOORMAN *v.* GREENWOOD TRUST CO. Sup. Ct. Colo. Certiorari denied. Reported below: No. 95–1493, 908 P. 2d 532; No. 95–1500, 908 P. 2d 133.

No. 95–1497. CRAMER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 64 F. 3d 1406.

No. 95–1512. TOTEMOFF *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 905 P. 2d 954.

No. 95–1538. WEBB *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 68 F. 3d 482.

No. 95–1614. WESTLAND DEVELOPMENT CO., INC. *v.* CITY OF ALBUQUERQUE. Ct. App. N. M. Certiorari denied. Reported below: 121 N. M. 144, 909 P. 2d 25.

No. 95–1622. GURLEY, DBA MOLTAN CO. *v.* SWAIM. C. A. 7th Cir. Certiorari denied. Reported below: 73 F. 3d 711.

No. 95–1625. BOYCE ET AL. *v.* GREENWAY. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 1177.

No. 95–1628. LEHTINEN *v.* QUANTUM CHEMICAL CORP. C. A. 6th Cir. Certiorari denied. Reported below: 70 F. 3d 1272.

No. 95–1630. NASSIMOS ET AL. *v.* NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 74 F. 3d 1227.

No. 95–1643. Ellis et al. *v.* United Airlines, Inc. C. A. 10th Cir. Certiorari denied. Reported below: 73 F. 3d 999.

No. 95–1648. Wechsler *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 95–1650. Knapp Shoes Inc. *v.* Sylvania Shoe Manufacturing Corp. C. A. 1st Cir. Certiorari denied. Reported below: 72 F. 3d 190.

No. 95–1651. Shearson Lehman Brothers, Inc., fka Shearson Lehman Hutton, Inc., et al. *v.* Hughes, Hubbard & Reed. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 902 S. W. 2d 60.

No. 95–1654. Environmental Coalition of Ojai et al. *v.* Secretary of Commerce et al. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 1411.

No. 95–1665. Balandra Schiffahrts-Gesellschaft MBH & Co., KG *v.* Costa. C. A. 9th Cir. Certiorari denied. Reported below: 78 F. 3d 592.

No. 95–1671. Soffer *v.* Queens College of the City University of New York. C. A. 2d Cir. Certiorari denied.

No. 95–1677. Levien et ux. *v.* Commissioner of Internal Revenue. C. A. 11th Cir. Certiorari denied. Reported below: 77 F. 3d 497.

No. 95–1683. Hawes *v.* Virginia. Ct. App. Va. Certiorari denied.

No. 95–1685. Melka Marine, Inc. *v.* Town of Colonial Beach. Sup. Ct. Va. Certiorari denied.

No. 95–1686. Mitrano *v.* Town of Colonial Beach. Sup. Ct. Va. Certiorari denied.

No. 95–1701. Armstrong *v.* Commodity Futures Trading Commission. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 461.

No. 95–1736. Pepper et ux. *v.* Damer et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–1777. BASS *v.* SARASOTA COUNTY, FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 662 So. 2d 347.

No. 95–1792. OYLER *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 76 F. 3d 393.

No. 95–1804. LINEHAN ET AL. *v.* KEEFFE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 99 F. 3d 401.

No. 95–1806. SHOFFEITT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 126.

No. 95–1814. HUTCHING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 75 F. 3d 1453.

No. 95–1816. SANCHEZ *v.* UNITED STATES; and
No. 95–8924. CARVAJAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 78 F. 3d 599.

No. 95–1823. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 77 F. 3d 472.

No. 95–1824. SYKES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 73 F. 3d 772.

No. 95–1829. MARCHESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 72 F. 3d 124.

No. 95–1833. MIMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 79 F. 3d 1158.

No. 95–1849. PIC-A-STATE PA, INC., ET AL. *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 76 F. 3d 1294.

No. 95–1859. MCCASTLE *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 43 M. J. 438.

No. 95–1875. REED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 77 F. 3d 139.

No. 95–7378. SANDERS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 648 So. 2d 1272.

No. 95–7925. MAYS *v.* UNITED STATES; and
No. 95–7926. MAYS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 69 F. 3d 116.

No. 95–8108. Wharton *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 542 Pa. 83, 665 A. 2d 458.

No. 95–8394. Medina *v.* Singletary, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 59 F. 3d 1095.

No. 95–8540. Berget *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 907 P. 2d 1078.

No. 95–8545. Radic *v.* Chicago Transit Authority. C. A. 7th Cir. Certiorari denied. Reported below: 73 F. 3d 159.

No. 95–8546. McQueen *v.* Cannon et al. C. A. 5th Cir. Certiorari denied. Reported below: 79 F. 3d 1145.

No. 95–8552. Jackson *v.* Alabama. Sup. Ct. Ala. Certiorari denied. Reported below: 672 So. 2d 810.

No. 95–8553. Messler et al. *v.* Farmer, Judge, District Court of Appeal of Florida, Fourth District, et al. Sup. Ct. Fla. Certiorari denied. Reported below: 666 So. 2d 901.

No. 95–8555. Bishop *v.* Rickles, Fulton County Child Support Receiver, for the Use and Benefit of Smith. C. A. 11th Cir. Certiorari denied.

No. 95–8556. Christopher *v.* Ohio. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 95–8562. Glasscock *v.* Utah. Ct. App. Utah. Certiorari denied.

No. 95–8565. Duell *v.* Utah et al. C. A. 9th Cir. Certiorari denied. Reported below: 76 F. 3d 385.

No. 95–8566. Youngs *v.* Wheless, Bankruptcy Judge, United States District Court for the Southern District of Texas, et al. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 1268.

No. 95–8568. Lucas *v.* Thompson, Warden. Super. Ct. Tattnall County, Ga. Certiorari denied.

No. 95–8570. Calhoun *v.* Allen et al. C. A. 7th Cir. Certiorari denied.

No. 95–8575. Boyd *v.* Christian Methodist Episcopal Church et al. C. A. 4th Cir. Certiorari denied. Reported below: 73 F. 3d 356.

No. 95–8576. Fuller *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 95–8577. Holmes *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 320 S. C. 259, 464 S. E. 2d 334.

No. 95–8580. Williams *v.* Workers' Compensation Appeals Board et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–8583. Cheng *v.* Metropolitan Life Insurance Co. C. A. 2d Cir. Certiorari denied. Reported below: 71 F. 3d 404.

No. 95–8589. Tucker *v.* Montgomery Ward Credit Corp. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 876.

No. 95–8592. James *v.* Graziani et al. C. A. 4th Cir. Certiorari denied. Reported below: 67 F. 3d 295.

No. 95–8596. Zilich *v.* Mazurkiewicz, Superintendent, State Correctional Institution at Rockview, et al. C. A. 3d Cir. Certiorari denied. Reported below: 82 F. 3d 408.

No. 95–8598. Catanio *v.* Myers, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 69 F. 3d 543.

No. 95–8607. Warren *v.* Keane, Superintendent, Sing Sing Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 99 F. 3d 402.

No. 95–8622. Cantrell *v.* Moore, Director, South Carolina Department of Corrections, et al. C. A. 4th Cir. Certiorari denied. Reported below: 73 F. 3d 356.

No. 95–8656. Gee *v.* Campbell. C. A. 10th Cir. Certiorari denied. Reported below: 77 F. 3d 492.

No. 95–8662. Murphy *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 82 F. 3d 434.

No. 95–8664. Lang *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 95–8729. Downs *v.* Virginia et al. C. A. 4th Cir. Certiorari denied. Reported below: 76 F. 3d 372.

No. 95–8758. Wright *v.* Delaware. Sup. Ct. Del. Certiorari denied. Reported below: 671 A. 2d 1353.

No. 95–8782. Hansen *v.* Nebraska. Sup. Ct. Neb. Certiorari denied. Reported below: 249 Neb. 177, 542 N. W. 2d 424.

No. 95–8816. Wootton *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 672 So. 2d 553.

No. 95–8818. Baxter *v.* City of Los Angeles, California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–8837. Carson *v.* Fauver. C. A. 3d Cir. Certiorari denied.

No. 95–8847. Medina-Acevedo *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 73 F. 3d 364.

No. 95–8866. Molina *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 75 F. 3d 600.

No. 95–8869. Graves *v.* Saunders, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 77 F. 3d 468.

No. 95–8875. LeBon *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 72 F. 3d 121.

No. 95–8883. Bevill *v.* Mississippi. Ct. App. Miss. Certiorari denied. Reported below: 672 So. 2d 768.

No. 95–8884. Correa *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 69 F. 3d 679.

No. 95–8896. Smith *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 81 F. 3d 166.

No. 95–8901. Couse *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 1284.

No. 95–8907. Smith *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 78 F. 3d 585.

No. 95–8908. Sweat *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 78 F. 3d 600.

No. 95–8916. LLOYD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 71 F. 3d 1256.

No. 95–8930. ANGEL RIVERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 77 F. 3d 1348.

No. 95–8931. BENAVIDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 79 F. 3d 1144.

No. 95–8932. BOLD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 944.

No. 95–8933. ADAMES ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 56 F. 3d 737.

No. 95–8934. BARRON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 77 F. 3d 490.

No. 95–8937. CORTI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 79 F. 3d 1158.

No. 95–8940. RIVERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 681.

No. 95–8941. PUREFOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 79 F. 3d 1142.

No. 95–8946. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 79 F. 3d 1144.

No. 95–8947. STEDMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 69 F. 3d 737.

No. 95–8955. ASHLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 78 F. 3d 600.

No. 95–8956. FRANCIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 82 F. 3d 77.

No. 95–8957. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 75 F. 3d 178.

No. 95–8959. HURTADO-GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1147.

No. 95–8961. GAMBLE *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 73 F. 3d 357.

No. 95–8962. ERWIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 475.

No. 95–8965. DOUGLAS *v.* UNITED STATES C. A. 2d Cir. Certiorari denied. Reported below: 81 F. 3d 324.

No. 95–8977. JACOBS *v.* CIRCUIT COURT OF WISCONSIN, MARATHON COUNTY. C. A. 7th Cir. Certiorari denied. Reported below: 73 F. 3d 164.

No. 95–8980. KARIMI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 79 F. 3d 1139.

No. 95–8982. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 79 F. 3d 1145.

No. 95–1429. ILLINOIS *v.* MONTANEZ. App. Ct. Ill., 1st Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 273 Ill. App. 3d 844, 652 N. E. 2d 1271.

No. 95–1636. EXXON CORP. *v.* YOUELL ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 74 F. 3d 373.

No. 95–8824. PANDEY *v.* PAUL REVERE LIFE INSURANCE CO. ET AL. App. Ct. Mass. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 39 Mass. App. 1108, 655 N. E. 2d 391.

No. 95–1637. SEARIVER MARITIME, INC. *v.* EXXON SEAMEN'S UNION. C. A. 3d Cir. Motion of Institute for a Drug-Free Workplace for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 73 F. 3d 1287.

Rehearing Denied

No. 95–1191. TRAHAN *v.* TRAHAN, *ante,* p. 1155;

No. 95–1364. SMITH *v.* GLENOLDEN BOROUGH ET AL., *ante,* p. 1167;

No. 95–6996. QUIBA *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante,* p. 1138;

No. 95–7008. DAGUINOTNOT *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante,* p. 1138;

No. 95–7043. ALFEROS *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante,* p. 1139;

No. 95–7045. BONDAD *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante,* p. 1139;

No. 95–7066. RABE *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante,* p. 1139;

No. 95–7089. FLORENTINO *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante,* p. 1139;

No. 95–7279. BEETS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante,* p. 1157;

No. 95–7359. MISEK-FALKOFF *v.* KELLER, 516 U. S. 1135;

No. 95–7389. CORONEL *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante,* p. 1140;

No. 95–7485. SANTOS *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante,* p. 1141;

No. 95–7725. FORONDA *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante,* p. 1141;

No. 95–7726. GARCIA *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante,* p. 1141;

No. 95–7769. SMITH *v.* PENNSYLVANIA, *ante,* p. 1141;

No. 95–7852. LYNCH *v.* NORTH CAROLINA, *ante,* p. 1143;

No. 95–7947. OLSEN *v.* LANE ET AL., *ante,* p. 1158;

No. 95–8031. FRANKLYN *v.* VISTA DEL MAR ET AL., *ante,* p. 1169;

No. 95–8102. CSORBA *v.* ITT ELECTRO-OPTICAL PRODUCTS DIVISION, *ante,* p. 1160; and

No. 95–8151. MAURO *v.* UNITED STATES, *ante,* p. 1126. Petitions for rehearing denied.

No. 95–7134. HARDY ET UX. *v.* CITY OF ORLANDO, *ante,* p. 1139. Motion for leave to file petition for rehearing denied.

JUNE 11, 1996

Miscellaneous Order

No. A–1022 (95–9264). OXFORD *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

JUNE 13, 1996

Miscellaneous Order

No. A–1019 (95–9261). SMITH *v.* PARKE, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 23, 1996, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1256. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, and 514 U. S. 1137.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 23, 1996

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 23, 1996

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 21, 25, and 26.

[See *infra*, pp. 1259–1262.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1996, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 21. Writs of mandamus and prohibition, and other extraordinary writs.

(*a*) *Mandamus or prohibition to a court: petition, filing, service, and docketing.*

(1) A party petitioning for a writ of mandamus or prohibition directed to a court shall file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party shall also provide a copy to the trial court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2)(A) The petition shall be titled "In re [name of petitioner]."

(B) The petition shall state:

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to understand the issues presented by the petition; and

(iv) the reasons why the writ should issue.

(C) The petition shall include copies of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition.

(3) When the clerk receives the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(*b*) *Denial; order directing answer; briefs; precedence.*

(1) The court may deny the petition without an answer. Otherwise, it shall order the respondent, if any, to answer within a fixed time.

(2) The clerk shall serve the order to respond on all persons directed to respond.

(3) Two or more respondents may answer jointly.

(4) The court of appeals may invite or order the trial court judge to respond or may invite an amicus curiae to do so. The trial court judge may request permission to respond but may not respond unless invited or ordered to do so by the court of appeals.

(5) If briefing or oral argument is required, the clerk shall advise the parties, and when appropriate, the trial court judge or amicus curiae.

(6) The proceeding shall be given preference over ordinary civil cases.

(7) The circuit clerk shall send a copy of the final disposition to the trial court judge.

(*c*) *Other extraordinary writs.*—Application for an extraordinary writ other than one of those provided for in subdivisions (a) and (b) of this rule shall be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

(*d*) *Form of papers; number of copies.*—All papers may be typewritten. An original and three copies shall be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Rule 25. Filing, proof of filing, service, and proof of service.

(*a*) *Filing.*

(*1*) *Filing with the clerk.*—A paper required or permitted to be filed in a court of appeals shall be filed with the clerk.

(*2*) *Filing: method and timeliness.*

(*A*) *In general.*—Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(*B*) *A brief or appendix.*—A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to the clerk for delivery within 3 calendar days by a third-party commercial carrier.

(*C*) *Inmate filing.*—A paper filed by an inmate confined in an institution is timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of a paper by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U. S. C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid.

(*D*) *Electronic filing.*—A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

(*3*) *Filing a motion with a judge.*—If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge shall note the filing date on the motion and give it to the clerk.

(*4*) *Clerk's refusal of documents.*—The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

. . . . .

(c) *Manner of service.*—Service may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party shall be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes delivery of the copy to a responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(*d*) *Proof of service; filing.*—A paper presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, of the name of the person served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service shall also state the date and manner by which the document was mailed or dispatched to the clerk.

* * * * *

Rule 26. Computation and extension of time.

* * * * *

(*c*) *Additional time after service.*—When a party is required or permitted to act within a prescribed period after service of a paper upon that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 23, 1996, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1264. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, and 514 U. S. 1145.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 23, 1996

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 23, 1996

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006.

[See *infra*, pp. 1267–1278.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 1996, and shall govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1006. Filing fee.

(*a*) *General requirement.*—Every petition shall be accompanied by the filing fee except as provided in subdivision (b) of this rule. For the purpose of this rule, "filing fee" means the filing fee prescribed by 28 U. S. C. § 1930(a)(1)–(a)(5) and any other fee prescribed by the Judicial Conference of the United States under 28 U. S. C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

. . . . .

Rule 1007. Lists, schedules and statements; time limits.

. . . . .

(*c*) *Time limits.*—The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the schedules and statements, other than the statement of intention, shall be filed by the debtor within 15 days after entry of the order for relief. Schedules and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

. . . . .

Rule 1019. Conversion of Chapter 11 reorganization case, Chapter 12 family farmer's debt adjustment case, or Chapter 13 individual's debt adjustment case to Chapter 7 liquidation case.

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

* * * * *

Rule 2002. Notices to creditors, equity security holders, United States, and United States trustee.

(*a*) *Twenty-day notices to parties in interest.*—Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

(1) the meeting of creditors under § 341 of the Code;

(2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice;

(3) the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent;

(4) in a chapter 7 liquidation, a chapter 11 reorganization case, and a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case, unless the hearing is under § 707(b) of the Code, or the conversion of the case to another chapter;

(5) the time fixed to accept or reject a proposed modification of a plan;

(6) hearings on all applications for compensation or reimbursement of expenses totaling in excess of $500;

(7) the time fixed for filing proofs of claims pursuant to Rule 3003(c); and

(8) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan.

* * * * *

(*c*) *Content of notice.*

. . . . .

(*2*) *Notice of hearing on compensation.*—The notice of a hearing on an application for compensation or reimbursement of expenses required by subdivision (a)(6) of this rule shall identify the applicant and the amounts requested.

. . . . .

(*f*) *Other notices.*—Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of: (1) the order for relief;

. . . . .

and (8) a summary of the trustee's final report in a chapter 7 case if the net proceeds realized exceed $1,500. Notice of the time fixed for accepting or rejecting a plan pursuant to Rule 3017(c) shall be given in accordance with Rule 3017(d).

. . . . .

(*h*) *Notices to creditors whose claims are filed.*—In a chapter 7 case, after 90 days following the first date set for the meeting of creditors under § 341 of the Code, the court may direct that all notices required by subdivision (a) of this rule be mailed only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.

(*i*) *Notices to committees.*—Copies of all notices required to be mailed pursuant to this rule shall be mailed to the committees elected under § 705 or appointed under § 1102 of the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a)(2), (3) and (6) of this rule be transmitted to the United States trustee and be mailed only to the committees elected under § 705 or appointed under § 1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be mailed to them. A committee appointed under § 1114 shall receive copies of all notices required by subdivisions (a)(1), (a)(5), (b), (f)(2), and (f)(7), and such other notices as the court may direct.

. . . . .

(*k*) *Notices to United States trustee.*—Unless the case is a chapter 9 municipality case or unless the United States trustee requests otherwise, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), and (f)(8) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses. Notices to the United States trustee shall be transmitted within the time prescribed in subdivision (a) or (b) of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court. Nothing in these rules requires the clerk or any other person to transmit to the United States trustee any notice, schedule, report, application or other document in a case under the Securities Investor Protection Act, 15 U. S. C. § 78aaa et seq.

. . . . .

Rule 2015. Duty to keep records, make reports, and give notice of case.

. . . . .

(*b*) *Chapter 12 trustee and debtor in possession.*—In a chapter 12 family farmer's debt adjustment case, the debtor in possession shall perform the duties prescribed in clauses (2)–(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court. If the debtor is removed as debtor in possession, the trustee shall perform the duties of the debtor in possession prescribed in this paragraph.

(*c*) *Chapter 13 trustee and debtor.*

(*1*) *Business cases.*—In a chapter 13 individual's debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses (2)–(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court.

. . . . .

Rule 3002. Filing proof of claim or interest.

(*a*) *Necessity for filing.*—An unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005.

. . . . .

(*c*) *Time for filing.*—In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code, except as follows:

(1) A proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief. On motion of a governmental unit before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the governmental unit.

. . . . .

Rule 3016. Filing of plan and disclosure statement in Chapter 9 municipality and Chapter 11 reorganization cases.

(*a*) *Identification of plan.*—Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it.

(*b*) *Disclosure statement.*—In a chapter 9 or 11 case, a disclosure statement under § 1125 or evidence showing compliance with § 1126(b) of the Code shall be filed with the plan or within a time fixed by the court.

Rule 4004. Grant or denial of discharge.

. . . . .

(*c*) *Grant of discharge.*

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case pursuant to Rule 1017(e), the court shall forthwith grant the discharge unless:

(a) the debtor is not an individual,

(b) a complaint objecting to the discharge has been filed,

(c) the debtor has filed a waiver under § 727(a)(10),

(d) a motion to dismiss the case pursuant to Rule 1017(e) is pending,

(e) a motion to extend the time for filing a complaint objecting to discharge is pending, or

(f) the debtor has not paid in full the filing fee prescribed by 28 U. S. C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U. S. C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

(2) Notwithstanding Rule 4004(c)(1), on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within that period, the court may defer entry of the order to a date certain.

. . . . .

Rule 5005. Filing and transmittal of papers.

(*a*) *Filing.*

(*1*) *Place of filing.*—The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U. S. C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

(*2*) *Filing by electronic means.*—A court may by local rule permit documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * *

Rule 7004. Process; service of summons, complaint.

(*a*) *Summons; service; proof of service.*—Rule 4(a), (b), (c)(1), (d)(1), (e)–(j), (l), and (m) F. R. Civ. P. applies in adversary proceedings. Personal service pursuant to Rule 4(e)–(j) F. R. Civ. P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(*b*) *Service by first class mail.*—Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)–(j) F. R. Civ. P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state. The summons and complaint in that case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint

either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is pending.

(*c*) *Service by publication.*—If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(e)–(j) F. R. Civ. P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail, postage prepaid, to the party's last known address, and by at least one publication in such manner and form as the court may direct.

(*d*) *Nationwide service of process.*—The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

(*e*) *Summons: time limit for service.*—If service is made pursuant to Rule 4(e)–(j) F. R. Civ. P. it shall be made by delivery of the summons and complaint within 10 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

(*f*) *Personal jurisdiction.*—If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F. R. Civ. P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

(*g*) *[Abrogated].*

(*h*) *Service of process on an insured depository institution.*—Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—

(1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;

(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Rule 8008. Filing and service.

(*a*) *Filing.*—Papers required or permitted to be filed with the clerk of the district court or the clerk of the bankruptcy appellate panel may be filed by mail addressed to the clerk, but filing is not timely unless the papers are received by the clerk within the time fixed for filing, except that briefs are deemed filed on the day of mailing. An original and one copy of all papers shall be filed when an appeal is to the district court; an original and three copies shall be filed when an appeal is to a bankruptcy appellate panel. The district court or bankruptcy appellate panel may require that additional copies be furnished. Rule 5005(a)(2) applies to papers filed with the clerk of the district court or the clerk of the bankruptcy appellate panel if filing by electronic means is authorized by local rule promulgated pursuant to Rule 8018.

* * * * *

Rule 9006. Time.

* * * * *

(c) *Reduction.*

* * * * *

(*2*) *Reduction not permitted.*—The court may not reduce the time for taking action pursuant to Rules 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and 9033(b).

* * * * *

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 23, 1996, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1280. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, and 514 U. S. 1151.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 23, 1996

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 23, 1996

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rules 5 and 43.

[See *infra*, p. 1283.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1996, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 5. Service and filing of pleadings and other papers.

*   *   *   *   *

(*e*) *Filing with the court defined.*—The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

Rule 43. Taking of testimony.

(*a*) *Form.*—In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

*   *   *   *   *

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 23, 1996, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post,* p. 1286. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, and 514 U. S. 1159.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 23, 1996

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 23, 1996

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rule 32.

[See *infra,* p. 1289.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1996, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32. Sentence and judgment.

* * * * *

(*d*) *Judgment.*

* * * * *

(*2*) *Criminal forfeiture.*—If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1289 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

NETHERLAND, WARDEN *v.* TUGGLE

ON APPLICATION TO VACATE STAY OF EXECUTION

No. A–910. Decided May 15, 1996

An application to vacate the Fourth Circuit's order staying respondent Tuggle's execution has been filed. However, there is no such stay in effect in this case. Although Tuggle asked the Fourth Circuit both to stay his execution and to stay issuance of its mandate in his case, the court order only stayed the issuance of its mandate.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicant has filed an application to vacate an order of the Court of Appeals for the Fourth Circuit staying the execution of respondent Tuggle. It is my understanding, however, that no such stay of execution is in effect. While Tuggle asked the Court of Appeals both to stay his execution and to stay issuance of its mandate in his case, see *Tuggle* v. *Netherland,* 79 F. 3d 1386 (1996), the Court of Appeals' order only stayed the issuance of its mandate for a period of 30 days. Hence there is no stay of execution for me to vacate.

The index and/or table of contents has been removed and photographed separately within this volume year.

For roll film users, this information for the current volume year is at the beginning of the microfilm. For a prior year volume, this information is at the end of the microfilm.

For microfiche users, the index and/or contents is contained on a separate fiche.